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# Human Rights Enforcement in the Twenty-First Century

Douglas L. Donoho

*Nova Southeastern University - Shepard Broad Law Center, [donohod@nsu.law.nova.edu](mailto:donohod@nsu.law.nova.edu)*

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# HUMAN RIGHTS ENFORCEMENT IN THE TWENTY-FIRST CENTURY

*Douglas Donoho\**

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\* Professor of Law, Nova Southeastern University, Shepard Broad Law Center, Ft. Lauderdale, Florida; LL.M., Harvard Law School; J.D., Rutgers University-Camden; B.A., Kalamazoo College.

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## I. INTRODUCTION

A. *The Disappointing Record*

The international human rights system enters the twenty-first century facing a profound anomaly. Despite remarkable normative and institutional developments since the system's inception,<sup>1</sup> the world remains mired in widespread violations of human dignity. Genocidal episodes have repeatedly scarred the consciousness of humankind since World War II.<sup>2</sup> Floods of refugees and simmering ethnic conflicts continually challenge the international community's capacity to respond,<sup>3</sup> and grotesque forms of physical abuse, such as torture and summary execution, remain commonplace.<sup>4</sup> Despite a promising

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<sup>1</sup> It is beyond controversy that the international system has developed a legal regime once thought improbable for the protection of human rights. In addition to an extensive network of widely adopted treaties covering nearly all aspects of human life, the international system boasts an elaborate institutional framework for protecting human rights. See generally HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (2d ed. 2000).

<sup>2</sup> See, e.g., U.N. High Comm'r on Human Rights, Comm. on the Elimination of Racial Discrimination, *Summary Record of the Second Part of the 1665th Meeting, Dialogue with Juan Mendez, Special Adviser on the Prevention of Genocide*, U.N. Doc. CERD/C/SR.1665/Add.1 (Aug. 20, 2004) (Committee Member Shahi observing that "[r]egrettably, the United Nations itself had been ineffective in preventing genocide. There had been at least fifty-five genocides since the Organization's founding, in which approximately 75 million people had died."). See also Gregory H. Stanton, *Genocides, Politicides, and Other Mass Murder Since 1945, With Stages in 2005*, GENOCIDE WATCH, <http://www.genocidewatch.org/genocidetable2005.htm> (last visited Oct. 26, 2006) (providing a table outlining the mass murder status and history of countries throughout the world). The persistence of genocidal episodes prompted Michael Scharf's wry observation that: "[T]he pledge of 'never again' quickly became the reality of 'again and again' . . . ." Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 861 (1997).

<sup>3</sup> The most recent example involves the crisis in Darfur, Sudan. See U.N. High Comm'r on Human Rights, *Report of the International Commission of Inquiry on Darfur to the U.N. Secretary-General* (Jan. 25, 2005), available at <http://www.ohchr.org/english/docs/darfurreport.doc>; U.N. Econ. & Soc. Council [ECOSOC] *Report of the U.N. High Comm. for Human Rights, Situation of Human Rights in the Darfur Region of the Sudan*, U.N. Doc. E/CN.4/2005/3 (May 7, 2004) (reporting a "pattern of massive and gross human rights violations"); HUMAN RIGHTS WATCH, *DARFUR DESTROYED, ETHNIC CLEANSING BY GOVERNMENT AND MILITIA FORCES IN WESTERN SUDAN*, Vol. 16, No. 6(a) (2004), available at <http://www.hrw.org/reports/2004/sudan0504>.

<sup>4</sup> Amnesty International believes that as many as 150 governments continue to practice torture. See Amnesty International, *Ask Amnesty*, <http://www.amnestyusa.org/askamnesty/torture200112.html> (last visited Oct. 26, 2006). Recent events at the Abu Ghraib Prison during

trend toward democratic governance around the world, basic civil liberties for countless millions remain only an empty promise.<sup>5</sup> Most disheartening of all, the two greatest enemies of human dignity, armed conflict and poverty, relentlessly plague the vast majority of humankind.<sup>6</sup> It seems undeniable that the elaborate international human rights edifice, now often rhetorically central in international relations, has made and can continue to make some difference. Yet, it is equally undeniable that the system has yet to fulfill its promises or significantly reduce violations of human rights worldwide.<sup>7</sup>

the war in Iraq reflect a cold reality for Americans that torture is neither a relic of the dark past nor something perpetrated solely by barbaric foreign despots. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: HUMAN DIGNITY DENIED, TORTURE AND ACCOUNTABILITY IN THE "WAR ON TERROR," AMR/51/145/2004 (Oct. 27, 2004), available at <http://web.amnesty.org/library/index/engamr511452004>; Editorial, *Legalizing Torture*, WASH. POST, June 9, 2004, at A20; Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004.

<sup>5</sup> See, e.g., WorldAudit.org, Freedom House Annual Survey, <http://www.worldaudit.org/civillibs.htm> (last visited Oct. 26, 2006) (rating freedom of human rights worldwide).

<sup>6</sup> See Armed Conflict Timeline Index 1800–1999, available at <http://www.onwar.com/aced/chrono/index.htm> (last visited Oct. 26, 2006) (listing more than seventy events during the 1990s that could fairly be described as "armed conflict"); see also Ploughshares Project, Armed Conflicts Report 2006, available at <http://www.ploughshares.ca/libraries/ACRText/ACR-TitlePageRev.htm> (last visited Nov. 10, 2006) (including links to reports on current armed conflicts, children and armed conflict, and world hunger and armed conflict); Uppsala Conflict Database, Uppsala University (Sweden), available at <http://www.pcr.uu.se/database/index.php> (last visited Nov. 15, 2006) (providing a detailed database concerning 121 armed conflicts between 1989 and 2005). The U.N. Food and Agricultural Organization and World Health Organization estimate that 25,000 people die every day from hunger and the effects of poverty, while nearly 800 million people are malnourished or hungry. United Nations World Food Programme, Hunger Facts, [http://www.wfp.org/aboutwfp/facts/hunger\\_facts.asp](http://www.wfp.org/aboutwfp/facts/hunger_facts.asp) (last visited Nov. 10, 2006). The Ploughshares Project also provides a map detailing the correlation between armed conflict and high percentages of under-nourished populations. See World Hunger and Armed Conflict, <http://www.ploughshares.ca/imagesarticles/ACR02/hungermap.02.pdf> (last visited Nov. 10, 2006).

<sup>7</sup> There is scant empirical evidence regarding whether the international human rights system is effectively achieving its objectives. Oona Hathaway's recent work is a rare example of empirically oriented legal research in human rights. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 935 (2002) (examining the correlations between ratification of human rights treaties and violations); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003) (examining whether the cost of commitment to international human rights treaties influences countries' decisions to join them); see also Ryan Goodman & Derek Jinks, *Measuring The Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003) (critiquing the premises and design of Hathaway's study); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 345 (1997) (analyzing state compliance with the decisions of human rights institutions); Randall Peerenboom, *Show Me The Money: The Dominance of Wealth in Determining Rights*

*B. Designed For Failure*

The apparent inability of the human rights system to deliver effectively on its lofty and noble promises is not, in many ways, surprising. It is, after all, a system designed with significantly limited enforcement capacity. Both Pollyannaish and cynical, the international system heavily relies upon the dubious premise that governments will faithfully implement international human rights standards within their own domestic systems and provide adequate domestic remedies to redress violations.<sup>8</sup> This reliance on voluntary compliance is theoretically bolstered by a network of international mechanisms and institutions that are, in reality, anemic at best. Although not without exceptions,<sup>9</sup> most international human rights institutions are generally limited to monitoring state compliance and promoting adherence to underdeveloped international standards through dialogue, condemnation, and moral suasion. Most of these institutions suffer from limited or ambiguous decision-making authority and lack effective, independent enforcement mechanisms.<sup>10</sup>

Thus constrained, the international system has generally failed to check the abuse of repressive governments and meaningfully deliver the promise of human rights to those most in need of protection. In essence, the international system's approach to enforcement and implementation of human rights has proven unrealistic in a world characterized by oppression, autocratic governments, poverty, and armed conflict. Although there is no clear consensus regarding what enforcement of international human rights should look like, few would disagree that existing enforcement mechanisms remain the weakest link in the international human rights system.

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*Performance in Asia*, 15 DUKE J. COMP. & INT'L L. 75 (2004) (surveying and discussing attempts to quantify human rights performance with an emphasis on Asia). Improvements in human rights conditions are difficult to quantify and causal relationships nearly impossible to demonstrate convincingly given the number and elusive nature of relevant variables.

<sup>8</sup> See *infra* notes 33–40, 45–46 and accompanying text.

<sup>9</sup> See *infra* notes 119–45 and accompanying text.

<sup>10</sup> See *infra* notes 68–81 and accompanying text. It is important to recognize that limitations on the decision-making authority of international institutions may serve far more important and less cynical purposes than preserving sovereign power. In the context of functioning democracies, such limitations may reflect appropriate concessions to competing interests such as preserving domestic democratic choice, local autonomy, and self-governance. See generally Douglas Lee Donoho, *Democratic Legitimacy in Human Rights: The Future of International Decision-Making*, 21 WIS. INT'L L.J. 1 (2003) (examining the tension between international governance of human rights and domestic democracy).

This Article considers some explanations for this enforcement gap and suggests that traditional approaches to enforcement, while serving some important functions, are inadequate to meet the challenge of effectively realizing human rights in the twenty-first century. These inadequacies include a variety of institutional, conceptual, and jurisprudential weaknesses, some of which are inherent in the system's current design. The most important of these interrelated weaknesses include: (1) failure to develop a coherent overall structure with institutions whose attributes are likely to promote the legitimacy of international decision-making and encourage state respect; (2) refusal to make important distinctions among rights with regard to enforcement methods; (3) failure to adequately pursue individual versus governmental accountability for violations; and (4) inability to develop adequate economic, political, and social incentives that might render voluntary state compliance a more realistic possibility.

### *C. Rethinking Human Rights Enforcement: Potential New Paradigms*

Reform of existing institutions is essential, and alternative approaches to enforcement should be developed. It is time to rethink the approach and role of international institutions regarding enforcement of human rights. Some important lessons can be drawn from several evolving alternative approaches to human rights enforcement and the success of the European Court of Human Rights (ECHR).<sup>11</sup> In this regard, there are three developing enforcement alternatives that are particularly important by virtue of their shared emphasis on individual accountability for a fairly narrow range of egregious, universally understood human rights violations.<sup>12</sup> The first two involve the increased use of "foreign" domestic legal processes,<sup>13</sup> both civil and criminal, to seek individual accountability against human rights abusers outside of their state of origin. These enforcement approaches might be described as the *Filartiga*<sup>14</sup> and *Pinochet*<sup>15</sup> paradigms, based upon the seminal cases that exemplify them.

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<sup>11</sup> See *infra* notes 141–47 and accompanying text.

<sup>12</sup> See *infra* Part III.A–C.

<sup>13</sup> "Foreign," in this sense, means reliance on domestic processes outside of the country in which the alleged violations occurred.

<sup>14</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that the Alien Tort Statute, 28 U.S.C. § 1350 (2000), authorized federal court jurisdiction over claims brought by a Paraguayan national against Paraguayan public officials for torture that took place in Paraguay). See *infra* notes 92, 106–18 and accompanying text.

<sup>15</sup> *Bow St. Metro. Stipendary Magistrate Ex parte Pinochet Ugarte*, [2000] 1 A.C. 147 (H.L.).

The third enforcement alternative, of which the *Pinochet* paradigm is arguably also a part, is the international criminalization of human rights violations.<sup>16</sup> A critical part of this trend is the evolution of meaningful international criminal law processes, such as those being developed by the International Criminal Court and ad hoc war crimes tribunals in the former Yugoslavia and in Rwanda.<sup>17</sup>

Although these developing alternatives are not themselves the answer to anemic human rights enforcement and each presents its own problems,<sup>18</sup> their shared characteristics provide important reform insights.<sup>19</sup> In particular, these alternative approaches suggest an important departure from traditional institutional frameworks by recognizing critical distinctions among rights with regards to appropriate enforcement methodologies.<sup>20</sup> Each focuses upon individual accountability.<sup>21</sup> Each takes advantage of forums with clearly established decision-making authority and effective enforcement mechanisms that are external, yet jurisdictionally constrained, to the violating state. Each focuses on a fairly narrow range of well-defined and egregious human rights violations. These three characteristics sharply distinguish these enforcement alternatives from more traditional approaches to human rights enforcement.

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1999). See *infra* note 91 and accompanying text; *infra* Part III.A.

<sup>16</sup> See *infra* note 93 and accompanying text; *infra* Part III.C.

<sup>17</sup> See *infra* Part III.C.

<sup>18</sup> Increased acceptance of alternative methodologies will, in its own right, improve human rights enforcement options for victims and increase the deterrence of wrongful behavior. See *infra* Part IV.A. Some have argued, however, that applying domestic processes to foreign human rights violations poses problems concerning foreign relations and the role of courts. These problems might include the dangers of retaliation, political manipulation, and disruption of foreign policy. See, e.g., Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001) (suggesting that these concerns are raised by international human rights litigation generally); Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433 (2002) (summarizing and responding to such concerns). Moreover, for a variety of reasons, it is unlikely that the alternatives will reach a significant number of defendants. See *infra* notes 154–57 and accompanying text.

<sup>19</sup> See *infra* notes 157–60 and accompanying text.

<sup>20</sup> See *infra* Part III.A–C; *infra* notes 157–58 and accompanying text.

<sup>21</sup> *Filartiga*-style cases are technically not limited to individual defendants. In the United States, for example, a foreign government may also be subjected to civil liability under the narrow exceptions to sovereign immunity authorized by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5) and (a)(7) (2000). The narrowness of this relatively recent exception and other complications in suing foreign governments have caused most litigation in the United States to focus on individual defendants.



The most important of these characteristics is a focus on egregious violations of largely uncontested human rights standards, such as those commonly associated with *jus cogens* and universal jurisdiction. This focus serves two related and critical purposes. First, it recognizes important distinctions among rights in terms of enforceability, which sets the groundwork for desperately needed improvements in the credibility and institutional legitimacy of international decision-making. As a practical matter, governments are more likely to create international institutions with meaningful enforcement powers *if such powers are jurisdictionally constrained to enforce rights for which true international consensus exists*.

Second, appropriate distinctions among rights may also serve to preserve and enhance domestic democracy by reserving the resolution of controversial and genuinely contestable human rights issues to more accountable and democratically legitimate local institutions, subject to relatively weak international supervision. Such distinctions reduce the potential for future, undesirable external interference in domestic democratic choice by international institutions that lack the credentials, accountability, and authenticity to render democratically legitimate decision-making regarding controversial moral issues. Correspondingly, such prudential constraints should allow incremental improvement in the credibility and stature of existing international human rights institutions whose effectiveness is ultimately vital to achieving universal adherence to human rights standards.

The persistent, historical refusal of the international system to recognize that not all rights should be implemented or enforced in the same ways has been a mistake.<sup>22</sup> It may well be that a relatively weak system of international supervision on the global level is the most appropriate model for those rights involving highly contested moral issues because that model best supports our common interest in democratic governance and self-determination. In contrast, strong enforcement mechanisms, including authoritative international criminal law and regional processes, are both more feasible and appropriate for other rights over which international consensus regarding meaning is clear, such as torture, genocide, and other egregious violations of basic human dignity.<sup>23</sup> In essence, the international system must develop a more rational, nuanced, and

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<sup>22</sup> The ECHR has developed a sophisticated jurisprudence recognizing the importance of such distinctions as appropriate to the circumstances of Europe. See Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 450-64 (2001).

<sup>23</sup> See *infra* Part IV.B.

practical approach to human rights enforcement if it hopes to fulfill the promise of human rights in the twenty-first century.

Although an unrealistic model for international enforcement generally,<sup>24</sup> the success of the ECHR provides additional, related insights regarding reform of existing international institutions.<sup>25</sup> The Court's development of effective institutional characteristics and a carefully crafted jurisprudence defining its role vis-à-vis democratic member states have been critical components of its successful enforcement record. Important lessons also may be drawn from the Court's regional focus and reliance on independently created economic, political, and cultural incentives to induce state compliance. The ECHR's success in navigating the inherent tension between international enforcement and national sovereignty has positive implications for the still uncertain and evolving relationship between international institutions and domestic democracy.

The following parts of this Article first provides an overview and critique of the traditional paradigms for enforcing international human rights standards. The purpose of this overview is to clearly identify existing enforcement alternatives and pinpoint their fundamental weaknesses and limitations. Part III briefly describes the developing enforcement trends identified above and important characteristics of the ECHR that highlight lessons for reforming other existing institutions. The remainder of the Article is devoted to sorting out the implications of these trends and alternatives for the future of human rights enforcement, with a particular emphasis on the evolving relationship between international human rights and domestic democracy.

## II. PREVAILING PARADIGMS: TRADITIONAL APPROACHES TO HUMAN RIGHTS ENFORCEMENT

Accurately generalizing about human rights enforcement is not a simple task. The international human rights system is neither unified nor static. Over its relatively brief evolution, the system has generated a rather complicated structure comprising numerous institutions of varied decision-making authority, enforcement capacities, and mechanisms.<sup>26</sup> The success of these

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<sup>24</sup> See *infra* notes 143–45 and accompanying text.

<sup>25</sup> See *infra* notes 145–47, 158–60 and accompanying text.

<sup>26</sup> The international system's complexity reflects a lack of coherent overall structure and a pressing need for reorganization and rationalization that has persisted for many years. See, e.g., Douglas Lee Donoho, *The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique*, 14 MICH. J. INT'L L. 827, 839–50, 859–64 (1993).

institutions' enforcement efforts, at least if measured in terms of practical consequences, has also varied widely. Enforcement within the highly functional European System of Human Rights, for example, hardly resembles that of other international human rights institutions, such as those promoted by the U.N. treaty structure or the other regional systems. Indeed, as explained below, it is somewhat of a misnomer to describe the current work of many international human rights institutions as involving enforcement at all.<sup>27</sup>

Complicating matters, there is considerable disagreement among governments, scholars, and the institutions themselves over the appropriate role and authority of many human rights bodies. Some of these basic differences in viewpoint, prompted by lingering ambiguities over legal mandate,<sup>28</sup> are reflected in the subtle linguistic distinctions between words such as "monitoring," "supervision," "implementation," and "enforcement." To "monitor" or "supervise" may, for example, imply authority to suggest change but not necessarily the power to bind states in any technical legal sense. Similarly, even when human rights institutions are given technically "binding" legal authority, states may refuse to create mechanisms by which to effectuate implementation of their decisions. Such decisions are, in this sense, binding yet unenforceable.

The term "enforcement" is also subject to ambiguity due to the myriad of forms it may take and the imprecise ways in which it is commonly used.<sup>29</sup> For example, international institutions and governments increasingly bring pressure to bear on a transgressing government in order to induce a change in behavior or policy through public condemnation. Such pressure is often

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<sup>27</sup> See *infra* notes 32, 47–52 and accompanying text.

<sup>28</sup> See *infra* notes 68–81 and accompanying text.

<sup>29</sup> The dictionary definition of the word "enforce" reflects these various meanings: "1: to give force to: STRENGTHEN 2: to urge with energy 3: CONSTRAIN, COMPEL 4: to effect or gain by force 5: to carry out effectively (~laws) . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY (10th ed. 1996). Enforcement issues are endemic to the international legal order, which is characterized by institutions that generally lack direct mechanisms to compel compliance with their decisions. The problems of enforcement and compliance have continued to generate a steady stream of sophisticated academic literature. See, e.g., Jose E. Alvarez, *Why Nations Behave*, 19 MICH. J. INT'L L. 303 (1998); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879 (2003). See generally William C. Bradford, *International Legal Compliance: An Annotated Bibliography*, 30 N.C. J. INT'L L. & COM. REG. 379 (2004).

described as enforcement although it seldom involves mandatory sanctions, rarely induces any change in behavior, and can usually be ignored entirely without serious consequence.<sup>30</sup> In the discussion that follows, “enforcement” is generally used in the more limited sense to describe *authoritative* mechanisms that are designed and expected to *compel* direct consequences, such as changes in governmental policy, payment of civil compensation, or imposition of criminal penalties, under the *threat of meaningful sanction*.<sup>31</sup> Enforcement is, of course, only one of the many ways in which state compliance and implementation of human rights might be induced. As described below, enforcement in this sense forms only a small part of the existing international human rights regime.<sup>32</sup>

It is reasonably accurate to characterize the traditional model for implementing international human rights as involving the interplay of domestic and international authority along two related paths. The first path rests on the

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<sup>30</sup> There is no doubt that enforcement of human rights takes place in a more indirect sense on many other levels. For example, it is not unreasonable to think of state-to-state posturing over human rights in international relations as a form of enforcement. This is particularly true when such posturing takes place before international institutions that may condemn a state's human rights performance with subtle consequences for that state's economic prospects and standing in the international community. Similarly, some states have linked, at least on paper, their grants of foreign aid or trade benefits to certain human rights standards. See, e.g., Hathaway, *supra* note 29, at 504–05; Sorcha MacLeod, Remark, *Corporate Social Responsibility within the European Union Framework*, 23 WIS. INT'L L.J. 541, 542–43 (2005). This is undoubtedly enforcement on some level since such linkages are designed to induce changes in the human rights performance of other states.

<sup>31</sup> This definition appears analogous to Hart's position that law, by its nature, essentially requires the command of the sovereign, backed by meaningful sanctions compelled through the coercive power of the state. See *THE CONCEPT OF LAW* (H.L.A. Hart ed., 1961). However, the definition is used here solely in a pragmatic fashion to provide a meaningful benchmark for evaluating whether and how the international human rights system may generate practical consequences from legal norms.

<sup>32</sup> Promotional activities of international organizations, for example, potentially play an important role in encouraging state “internalization” of rights through national implementation of legal norms and empowerment of local populations. The literature regarding state compliance with international law also suggests that international legal and institutional processes play a subtle role beyond coercion in developing compliance over time. See generally Goodman & Jinks, *supra* note 29 (disputing the premise that effective international legal regimes must either coerce or persuade state actors and suggesting that regime design must account for complex “social” factors that influence state behavior, most prominently “acculturation”); Moore, *supra* note 29, at 882–99 (discussing human rights compliance as a form of “signaling” to other states regarding, among other things, readiness and capacity for diplomatic and economic relations). See generally Thomas M. Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* 183–94 (1990) (concept of “legitimacy” as an explanation of the “compliance pull” of international norms).

traditional premise that initial and primary authority for implementing and enforcing international standards lies with domestic institutions. The second path involves the participation of international institutions, most commonly through supervision and monitoring of state compliance.

#### *A. Voluntary Compliance and Domestic Primacy*

Under the text of most multilateral treaties, domestic institutions have primary and original responsibility to "give effect" to international human rights and provide an effective remedy for violations.<sup>33</sup> This approach to human rights enforcement, which might be described as the "domestic primacy" path, emphasizes and relies upon voluntary government compliance.

In this regard, it is important to recognize that international law does not require states to authorize direct enforcement of human rights obligations in domestic institutions.<sup>34</sup> Traditionally, states have been categorized as either "monist" or "dualist" in this regard, depending upon whether international obligations are automatically treated as operable domestic law or, rather, only

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<sup>33</sup> Article 2(2) of the International Covenant on Civil and Political Rights, G.A. Res. 2200A, at 49, U.N. Doc A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR], is illustrative. It provides:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

*Id.* The primacy of national implementation is also reflected in the ubiquitous requirement that domestic remedies be exhausted as a prerequisite to invoking the jurisdiction of international human rights institutions. See, e.g., Organization of American States, American Convention on Human Rights art. 46(1)(a), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]; Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter Optional Protocol]; see also Advisory Opinion OC-11/90 of Aug. 10, 1990, Exceptions to the Exhaustion of Domestic Remedies, arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights, Inter-Am. Ct. H.R. (ser. A) No. 11, paras. 2, 14; Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 VA. J. INT'L L. 1, 59-61 (1999).

<sup>34</sup> Most international human rights treaties include an obligation to provide effective remedies for the rights recognized in the treaty, but do not require direct incorporation of the treaty itself. See, e.g., Human Rights Committee, Gen. Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (requiring "that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order").

incorporated into domestic law through specific executive or legislative action.<sup>35</sup> Monist states follow a “direct” or “automatic” incorporation approach that essentially treats international law obligations, *ipso facto*, as part of the domestic legal system enforceable like any other source of domestic law. Such direct incorporation would arguably reflect the pinnacle of enforceability since international standards would be directly applied and violations remedied, at least in functioning democracies, by independent and effective domestic institutions.<sup>36</sup>

So-called “dualist” states, in contrast, generally choose to implement international human rights obligations solely (or primarily) through legislative or executive intercession. Under a dualist conception, international obligations gain the status of domestic law only when affirmatively incorporated into the domestic system. Thus, for example, a dualist state may selectively create domestic laws and remedies that are designed to protect certain internationally based rights, although the originating treaty or customary principle is not itself directly actionable.<sup>37</sup> In essence, international legal obligations must pass through a “domestic filter” in order to become an enforceable part of the domestic legal order.

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<sup>35</sup> See, e.g., MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 85–86 (4th ed. 2003). See Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530–31 (1999); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864–66 (1987); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 55–56 (2004).

<sup>36</sup> The actual enforceability of an international obligation would, even under a monist approach, depend on additional factors. For example, two distinct and critical issues in this regard are the precise legal status of the directly incorporated international obligation and allocation of final authority over interpretation of the precise meaning of the obligation once incorporated. In some states, like Germany, international law is treated, at least theoretically, as superior to other forms of domestic law. See JANIS, *supra* note 35, at 85–86, 97–102, 105–09. In the United States, an incorporated treaty (self-executing) has the constitutional status of federal law, and therefore, trumps inconsistent state law but not subsequently enacted federal statutes. *Id.* The status of customary international law, while often debated, see *infra* note 38, appears to be lower than either treaties or federal law. See *The Paquete Habana*, 175 U.S. 677, 700, 708 (1900). Direct incorporation raises yet unanswered questions regarding the authority of domestic versus international institutions to interpret and authoritatively apply international standards. At least in the United States, it seems apparent that domestic institutions would assert ultimate authority over interpretation of an incorporated international obligation. See, e.g., Brad R. Roth, *The Enduring Significance of State Sovereignty*, 56 FLA. L. REV. 1017, 1032 (2004) (asserting that “the treaty interpretations that prevail are those of United States courts, not international or foreign courts . . .”).

<sup>37</sup> See *supra* notes 35–36 and accompanying text.

While useful descriptively, these distinctions fail to capture the complicated nuances of actual state practice, which most often appears to reflect subtle variations on the dualist conception.<sup>38</sup> Although there is little empirical evidence regarding the prevalence of either approach to international human rights obligations, it is commonly thought that dualism is far more common than truly monist approaches.<sup>39</sup> Under these widespread dualist approaches to international law, the enforceability of international human rights obligations via domestic institutions ultimately depends on the discretionary actions of national authorities. Thus, effective domestic implementation essentially rests upon the voluntary, discretionary actions of each government.<sup>40</sup>

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<sup>38</sup> See MALCOLM N. SHAW, *INTERNATIONAL LAW* 100–01, 127 (4th ed. 1997); Henkin, *supra* note 35, at 865 (noting that “[f]ew if any nations are either strictly monist or strictly dualist”); Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT’LL. 281, 293–309 (1999) (reviewing incorporation practices of various Latin American states). The U.S. legal system is an excellent example of these nuances. At least nominally, the United States Constitution appears to create a monist approach. See U.S. CONST. art. VI, § 1, cl. 2; *The Paquete Habana*, 175 U.S. at 700. In reality, however, United States law reflects a hybrid of monist and dualist characteristics by virtue of the judicially created doctrine of self-executing treaties and its sometimes ambiguous treatment of international customary law. Self-executing treaties may be directly incorporated into the domestic legal system and actionable without prior legislative authorization. However, no significant international human rights treaty has ever been held self-executing in the United States. This is due to, at least in part, the Senate’s consistent practice of attaching a declaration of non-self-execution to such treaties. See generally Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515 (1991). Customary law, in contrast, is generally treated as an actionable part of the domestic legal system, but with a status below that of most other forms of domestic law. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Paquete Habana*, 175 U.S. at 677; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The precise legal status of customary law, particularly whether its violation is actionable in the federal courts, is still subject to intense debate. See generally Ehren J. Brav, *Recent Development, Opening The Courtroom Doors to Non-Citizens: Cautiously Affirming Filartiga for the Alien Tort Statute*, 46 HARV. INT’LL.J. 265 (2005) (summarizing the debate over the status on customary international law and the implications of the *Sosa* decision).

<sup>39</sup> See JANIS, *supra* note 35, at 85–86, 97–102, 105–08.

<sup>40</sup> One might presume that states ratify human rights treaties with a commitment to voluntarily comply with their provisions for the good of their people. More cynical explanations for state ratification of treaties are, sadly, more plausible. Many states undoubtedly join human rights treaties precisely because they expect few consequences from doing so. How else can one explain widespread adoption of human rights treaties among the world’s most egregious violators?

### *B. The Traditional Role of International Institutions*

Most international human rights institutions have, at minimum, responsibility to “monitor” or “supervise” the presumed national implementation of international obligations by state parties.<sup>41</sup> In this sense, the traditional model for effectuating international rights necessarily also implicates international authority. Thus, a second major path of human rights enforcement involves the work of international human rights institutions and the response of domestic legal systems to that work product. The critical considerations in this regard involve the authority of international institutions and mechanisms for enforcement.

Theoretically, the international side of rights enforcement could take place under a vertical or “top-down” model in which authoritative international human rights institutions would directly compel compliance with human rights standards, utilizing means ranging from an “international marshal’s office” to binding economic sanctions.<sup>42</sup> As currently situated, however, international human rights institutions do not enjoy the capacity to directly enforce their own decisions.<sup>43</sup> Lacking their own enforcement powers and mechanisms, these institutions must instead rely on the domestic enforcement capacities and goodwill of domestic governments.

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<sup>41</sup> Cf. *supra* note 33 and accompanying text; *infra* notes 72–77 and accompanying text; STEINER & ALSTON, *supra* note 1, at 503–04, 522–35, 537–39, 556.

<sup>42</sup> Arguments favoring “linkages” between human rights compliance and participation in international economic institutions such as the International Monetary Fund (IMF), World Bank and, World Trade Organization (WTO) are creative extensions of this basic idea. See generally David W. Leebron, *Linkages*, 96 AM. J. INT’L L. 5 (2002); Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT’L L. 126 (2002); Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, 19 U. PA. J. INT’L ECON. L. 391 (1998).

<sup>43</sup> See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, reprinted in WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 176 (2001) [hereinafter ICC Treaty]. Even international criminal law institutions such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC) are generally forced to rely on the existing institutional enforcement mechanisms of member states. The ICTY may indict, issue arrest warrants, prosecute, and sentence perpetrators of crimes against humanity, and it has the imprimatur and authority of the United Nations Security Council. Yet, it has no means of directly effectuating any of these powers. Rather, the ICTY relies on the enforcement capacity of member states that agree to carry out its orders and ultimately even punish those convicted. See U.N. International Criminal Tribunal for the Former Yugoslavia, ICTY at a Glance, <http://www.un.org/icty/glance-e/index.htm> (last visited Nov. 9, 2006).



Because of this forced reliance, the theoretical apex of enforceability for international institutions would occur if and when states recognized international decisions as authoritative and binding, and allowed the direct enforcement of such decisions by domestic institutions. In essence, states could choose to give the decisional output of human rights institutions "direct effect" without requiring prior legislative or executive action or approval.<sup>44</sup> The reality is, however, that international law does not require that states adopt this approach to international decision-making and few, if any, states appear to have done so.<sup>45</sup> For the vast majority of the international community, the decisions of international human rights institutions are simply not treated as binding or authoritative within the domestic legal order, even if technically "binding" under the relevant treaty regime.<sup>46</sup>

Ultimately, most governments choose to enforce international decisions, if at all, solely through discretionary domestic legislative or executive action. Governments have generally reserved to themselves final discretion regarding the actual manner and method for enforcement of international institution

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<sup>44</sup> Roth, *supra* note 36, at 1032. Recognition of the decisions of international institutions presents distinct issues from the question of incorporation of international obligations generally.

<sup>45</sup> See generally Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 491-95 (2003). There are, of course, exceptions such as Costa Rica. See Holly Dawn Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311, 317-18 (1997) (citing Annual Report of the Inter-Am. C.H.R., Report No. 16/26, OEA/Ser.L/VII.6, doc. 13 (Oct. 16, 1982) (discussing legislation ratified by the Legislative Assembly of Costa Rica on September 9, 1983, Law No. 6889)). Even within the highly effective European system, both the European Court of Justice of the European Union and the ECHR primarily rely on the willingness of member states to voluntarily comply with and enforce their judgments. See Helfer & Slaughter, *supra* note 7, at 297.

<sup>46</sup> A good example of this is the Inter-American Court of Human Rights. See *infra* note 54. Although the Court's decisions under the American Convention's individual petitioning process are technically binding on the state defendant, states have often simply ignored the Court, inevitably without serious consequences. See, e.g., Constitutional Court Case (Peru), Inter-Am. Ct. H.R. (ser. E), ¶ 14 (Aug. 14, 2000); Jarmul, *supra* note 45, at 317-18; see also Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1870-94 (2002) (discussing the withdrawal from the U.N. Human Rights Committee's jurisdiction by three Caribbean states after adverse rulings). In contrast, virtually all parties to the European Convention on Human Rights have acknowledged the binding nature of the ECHR's decisions. See Helfer & Slaughter, *supra* note 7, at 276, 295-97. National courts may, of course, sometimes choose to follow the decisions of international tribunals as persuasive authority. See Martinez, *supra* note 45, at 491-95 (describing the occasional persuasive influence of international decision-making on national courts, including the controversial influence of international and foreign law on the U.S. Supreme Court).

decisions, if they enforce them at all. The key element to effective enforcement once again lies with each government's discretionary voluntary compliance, in this instance whether to treat the output of international human rights bodies as authoritative and translate those decisions into action.

It is fair to say that the traditional model for human rights enforcement involves a rather murky convergence between the two enforcement paths described above. International human rights treaties generally place primary responsibility for implementation and enforcement in the hands of national authorities subject to typically ambiguous international supervisory powers. International institutions monitor state compliance and may offer alternative forms of redress when the national system fails. These international processes are not generally authoritative, however, and even when technically binding lack clear enforcement mechanisms. The effectiveness of international remedies is, in turn, almost always dependent on the subject government's willingness to voluntarily comply. Since international institutions lack both authority and independent enforcement capacities, actual enforcement of international remedies ultimately depends upon the willingness of the perpetrators to meaningfully implement rights and comply with international supervisory authority.

### *C. Institutional Failures and Ambiguous Authority*

It is important to recognize initially that much of the work product of the current international human rights system is not designed for enforcement, at least in the sense described above. Rather, existing institutions are designed primarily to promote human rights through disclosure, dialogue, and technical assistance. For example, the United Nations charter-based system, which primarily involves the politically dominated work of the Commission on Human Rights and its various subsidiary organizations,<sup>47</sup> does not seek to

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<sup>47</sup> See generally DAVID WEISSBRODT, JOAN FITZPATRICK & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS ch.6 (3d ed. 2001). Commonly referred to in Western press as "discredited," the Commission on Human Rights was replaced in March 2006, by a reformed "Human Rights Council." See G.A. Res. 60/251, U.N. Doc. A/Res/60/251 (Mar. 15, 2006). The U.N. High Commissioner for Human Rights has become increasingly important as a spokesperson and promoter of human rights and often provides a rapid response to developing human rights crises. The Commissioner's office has also organized and provided a more visible and centralized face to the U.N.'s important human rights activities. Thus far, however, the High Commissioner serves no direct enforcement role and has no overt authority in that regard.

enforce human rights in any direct manner.<sup>48</sup> Institutions created under the U.N.-sponsored network of multilateral human rights treaties are also primarily involved in work better described as promotion than enforcement. Each of the seven major multilateral human rights treaties sponsored by the U.N. creates a "committee" of experts who primarily serve fact-finding and promotional roles, reviewing state periodic reports on implementation and issuing "general comments."<sup>49</sup>

Although there has been some effort to assert authority to bind states pursuant to the General Comments,<sup>50</sup> it would be a misnomer to refer to such work as "enforcement," at least in the sense described above.<sup>51</sup> The promotional activity of human rights institutions focuses almost exclusively on encouraging states to voluntarily change their behavior through dialogue, confrontation, and exposure regarding alleged violations of international standards. This activity has important benefits but cannot, at least in the short term, be relied upon as a meaningful way to compel compliance with rights where needed most.<sup>52</sup>

Enforcement is probably more relevant to the various individual petitioning processes created by the regional systems and four of the major multilateral

<sup>48</sup> With some minor exceptions, these U.N. "charter-based" institutions essentially provide for a forum for public condemnation of friendless states guilty of a "consistent pattern of gross violations." ECOSOC Res. 1503, U.N. Doc. E/4832/Add.1 (May 27, 1970); ECOSOC Res. 1235, U.N. Doc. E/4393 (XLII) (1967). See also STEINER & ALSTON, *supra* note 1, at 361. With no authority to provide individual redress and no history of pursuing organized consequences for violating states, the work of these U.N. charter-based institutions simply does not involve enforcement in any meaningful sense, even though the Human Rights Commission (recently reformed into the Human Rights Council) has the authority to refer matters to the U.N. Security Council. *Id.* at 390-91.

<sup>49</sup> See Donoho, *supra* note 26, at 859-62. See generally STEINER & ALSTON, *supra* note 1.

<sup>50</sup> The Human Rights Committee appears to believe that General Comments issued by the Committee are authoritative and binding on the state parties. See, e.g., Human Rights Committee, *General Comment 24(52): General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant of the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994).

<sup>51</sup> See *supra* notes 29-32 and accompanying text. In some instances, the line between "enforcement" and "monitoring" is somewhat blurry. For example, the Commission on Human Rights has, since 1985, appointed a "Special Rapporteur on Torture" who has the authority to not only conduct fact-finding, but also release "urgent appeals" to governments regarding the treatment of specific individuals at risk of torture. See Office of the U.N. High Commissioner for Human Rights, *Torture—Urgent Appeals*, <http://www.ohchr.org/english/issues/torture/rapporteur/appeals.htm> (last visited Nov. 9, 2006).

<sup>52</sup> See *supra* note 32, *infra* notes 159-60 and accompanying text.

treaties.<sup>53</sup> Each of the three regional human rights systems—the Inter-American, European, and African—administer individual petitioning processes under which human rights victims may bring their complaints, after exhaustion of domestic remedies, before a judicial or quasi-judicial body for resolution.<sup>54</sup>

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<sup>53</sup> There are currently seven major treaty-based monitoring institutions operating under the United Nations system. Each of these “committees” is entrusted with monitoring state compliance with the rights recognized in their respective treaty texts. These seven major treaties comprehensively cover civil and political rights (ICCPR, *supra* note 33), economic and social rights (International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]), racial discrimination (International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD]), gender discrimination (Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]), torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT]), children’s rights (Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (Nov. 20, 1989) (entered into force Sept. 2, 1990) [hereinafter Children’s Convention]), and the rights of migrant workers (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/Res/45/158 (Dec. 18, 1990) (entered into force July 1, 2003)).

<sup>54</sup> The three regional systems are each designed to promote adherence to comprehensive regional human rights treaties covering a wide variety of human rights concerns. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, *amended by* Protocol 11, Nov. 1, 1998 [hereinafter European Convention]; Organization of American States, American Convention on Human Rights arts. 61, 63, 68, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978); African [Banjul] Charter on Human and Peoples’ Rights art. 24, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986). *See generally* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE chs. 7–9 (Hurst Hannum ed., 3d ed. 1999). The OAS has empowered the Inter-American Commission on Human Rights, which must be distinguished from the Inter-American Court of Human Rights, to serve monitoring functions under the OAS Charter and the American Declaration on the Rights and Duties of Man. The Commission also serves a quasi-judicial function, along with the Inter-American Court, under the Inter-American Convention on Human Rights. *See* Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439 (1990); Víctor Rodríguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593 (2000). In 1998, the Organization of African Unity (OAU) adopted a protocol to the African Charter that established an African Court on Human Rights to complement the work of the preexisting African Commission on Human and Peoples’ Rights. The court is not yet operational and may be merged with the African Court of Justice. *See* Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (June 9, 1998); Tim Curry, Nerina Cevra & Erin Palmer, *Updates From the Regional Human Rights Systems*, HUM. RTS. BRIEF, Winter 2005, at

ICCP, CAT, CERD, and CEDAW create similar processes that apply to any state that has voluntarily agreed to the relevant committee's petitioning jurisdiction.<sup>55</sup>

There are, of course, variations in the precise operation of these various petitioning systems. In general, however, each essentially provides an international forum before which individuals, from those states that have specially consented, may allege that the government has violated treaty-based human rights standards. In each system, those states consenting to the process have authorized international decision-makers to examine such allegations and, at minimum, present their views as to whether the government has complied with the relevant international agreement. As described below, the most critical question regarding these petitioning processes lies in the authoritativeness and enforceability of the various institutions' decisions.

The European system, under the leadership of the ECHR, has undoubtedly the most impressive enforcement record of these various individual petitioning systems.<sup>56</sup> Consent to the ECHR's jurisdiction is mandatory for all forty-one

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23. Each provides, with variations, a petitioning process that allows individuals to seek redress for alleged violations of the relevant treaty by their government. For a general description of these various processes see STEINER & ALSTON, *supra* note 1.

<sup>55</sup> Apart from the American Convention, each relevant treaty authorizes the petitioning process only for those state parties that specially consent. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; CERD, *supra* note 53, art. 14; CAT, *supra* note 53, art. 22. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4, U.N. Doc. A/RES/54/4 (Oct. 6, 1999) (entered into force Dec. 22, 2000). As of November 2006, eighty-three states had become parties to the Protocol. Division for the Advancement of Women, Signatures and Accessions/Ratifications to the Optional Protocol, <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm> (last visited Nov. 9, 2006). By March 2006, the Committee had rendered views concerning three communications. See *id.* (follow "Decisions/Views" hyperlink). The Committee on Migrant Workers (CMW), which held its first session in 2004, will have competence to hear individual complaints once ten state parties declare themselves subject to the process authorized in Article 77 of the Convention. See Office of the United Nations High Commissioner for Human Rights, Human Rights Bodies-Complaints Procedures, <http://www.ohchr.org/english/bodies/petitions/index.htm> (last visited Nov. 9, 2006). A draft optional protocol that would create an individual communications process under the CESC is now under consideration by a special working group of the CHR. See *id.* (follow "CESC" hyperlink). Parties to the American Convention subject themselves to the Convention's individual petitioning process before the Inter-American Commission by virtue of joining the treaty. American Convention, *supra* note 33, art. 44. They may also, at their discretion, subject themselves to the jurisdiction of the Inter-American Court, which reviews decisions made by the Commission regarding individual petitions. See *id.* art. 62.

<sup>56</sup> See generally Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics*

members of the European Convention and the Council of Europe.<sup>57</sup> Although not without exceptions, the decisions of the ECHR are generally respected and implemented by the state parties of the European Convention.<sup>58</sup> In some senses, the European system provides evidence regarding how traditional approaches to human rights enforcement might work under the right circumstances.<sup>59</sup>

The ECHR's success in securing compliance, while not unblemished,<sup>60</sup> stands in sharp contrast to the record of other international petitioning systems. The Inter-American system, for example, has had limited success in enforcing the decisions of its Commission and Court, even though those decisions are also technically "binding" under the American Convention on Human Rights.<sup>61</sup> The enforcement record regarding decisions of the treaty-based bodies, such

*of the New ECHR Control Mechanism as Established in Protocol 11 Signed on 11 May 1994*, 15 HUM. RTS. L.J. 81, 82 (1994); Helfer & Slaughter, *supra* note 7, at 282–337.

<sup>57</sup> European Convention, *supra* note 54, art. 34.

<sup>58</sup> See *infra* notes 141–47 and accompanying text. Most commentators, and the ECHR itself, see Council of Europe, Executions of Judgments of the European Court of Human Rights, [http://www.coe.int/T/E/Human\\_rights/execution/01\\_Introduction/01-Introduction.asp#TopofPage](http://www.coe.int/T/E/Human_rights/execution/01_Introduction/01-Introduction.asp#TopofPage) (last visited Nov. 9, 2006), suggest that there is a very high rate of state compliance with the Court's decisions. See, e.g., Helfer & Slaughter, *supra* note 7, at 276, 296. Professors Yoo and Posner, however, suggest that there is insufficient empirical data to support such assertions regarding compliance with ECHR decisions. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 64–66 (2005). But see Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005) (challenging Posner and Yoo on their methodology and conclusions).

<sup>59</sup> See *infra* notes 141–45 and accompanying text.

<sup>60</sup> See Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership*, 21 PENN ST. INT'L L. REV. 101, 101–02 (2002) (discussing problems with caseload and delay); Christian Tomuschat, *Quo Vadis Argentoratum? The Success Story of the European Convention on Human Rights—and a Few Dark Stains*, 13 HUM. RTS. L.J. 401 (1992) (discussing problems with delay, implementation, and enforcement).

<sup>61</sup> See, e.g., Jarmul, *supra* note 45, at 317–18; Kimberly D. King-Hopkins, Comment, *Inter-American Commission on Human Rights: Is Its Bark Worse than Its Bite in Resolving Human Rights Disputes?* 35 TULSA L.J. 421, 432–43 (2000). The successful outcome in the Court's very first decided case strangely illustrates the difficulties of enforcement within the Inter-American system. Only after a transition in government toward more democratic rule and fourteen years of intransigence did the Honduran Government finally pay compensation for "disappearances" it orchestrated in the 1980s. See Freddy Cuevas, *Honduras Pays Victims' Families*, DENVER POST, Nov. 10, 2000, at A45 (reporting that the Honduran government paid \$1.6 million dollars to victims' families pursuant to the Inter-American Court's 1986 judgment in the *Velazquez* disappearances case).

as the Human Rights Committee, is even more disappointing.<sup>62</sup> Given the ambiguous legal status of its decisions and the absence of enforcement mechanisms, it is perhaps more accurate to describe this disappointing record as a lack of voluntary compliance rather than a failure of enforcement.

There are undoubtedly many reasons why it has proven difficult to enforce the adjudicatory decisions of international human rights institutions outside the context of Europe. Most significantly, however, states have found it easy to ignore such decisions as the result of three related factors: (1) ambiguous mandates and limited legal authority; (2) lack of meaningful legal or practical incentives to induce state compliance; and (3) insufficient institutional legitimacy to induce voluntary compliance.<sup>63</sup>

Governments have not found it particularly painful to ignore the views and recommendations of most international human rights institutions because there are few, if any, serious consequences associated with doing so. Most governments comply with such decisions only when it is politically expedient to do so.<sup>64</sup> Lacking mechanisms that compel compliance through sanction or other meaningful practical incentives, enforcement of international decisions depends entirely on the political goodwill of the government concerned. Given that the government is, by definition, the perpetrator of the alleged violation, it is hardly surprising that compliance is the exception, especially in states ruled by oppressive regimes. There is, in this sense, an inherent contradiction

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<sup>62</sup> See Report of the Human Rights Committee, Vol. 1, ¶ 225, U.N. Doc. A/57/40 (2002) (estimating only 30% compliance); Report of the Human Rights Committee, Vol. 1, ¶ 256, U.N. Doc. A/58/40 (2004) (noting trend of non-compliance and expressing "deep concern" over the "increasing number of cases where States parties fail to implement the Committee's" final views on individual petitions); Helfer & Slaughter, *supra* note 7, at 345 (only eighty-one out of 154 states responded to the HRC's follow-up process for cases finding state violations of rights and only 30% of these eighty-one responses expressed a willingness to comply); see also Dana D. Fischer, *International Reporting Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 188 (Hurst Hannum ed., 1994); *infra* notes 76–77.

<sup>63</sup> See *infra* notes 68–81 and accompanying text.

<sup>64</sup> Australia's compliance with the HRC's controversial *Toonen* decision is a good example of this. Tasmania stood alone among Australian states in its outdated condemnation of consensual homosexual conduct, and the Australian federal government was in full agreement with the HRC on the merits. *Nicholas Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994). See also STEINER & ALSTON, *supra* note 1, at 740. Other countries, however, may choose to comply with HRC decisions with which they disagreed. WEISSBRODT, FITZPATRICK & NEWMAN, *supra* note 47, at 81–82 (discussing *Lovelace v. Canada*). These successes demonstrate again that compliance depends upon the political goodwill of the state, leaving enforcement least likely where it is needed most.

built into the system's approach to enforcement, which leaves compliance largely within the discretion of the perpetrators.

Reliance on voluntary compliance does not, of course, doom the human rights system to failure. Indeed, voluntary compliance with the decisions of respected international institutions should, ideally, have a central role in a rationally designed international enforcement regime.<sup>65</sup> Even in functioning domestic legal systems, it is primarily respect for the authority of the institution that ultimately renders judicial decisions readily enforceable, not any inherent power wielded by the court itself.<sup>66</sup> Voluntary compliance has also been essential to the success of the European system.<sup>67</sup> Although it operates under *sui generis* circumstances, the European system relies heavily

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<sup>65</sup> See *infra* note 159 and accompanying text.

<sup>66</sup> President Andrew Jackson's alleged response to the United States Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which would have potentially conflicted with a federal policy of forcibly removing Native Americans from their ancestral lands, highlights this point. Faced with the prospect of using federal authority to enforce the decision against state officials, Jackson is alleged to have said: "[M]arshall has made his decision, now let him enforce it." See Encyclopedia Britannica Online, Andrew Jackson: On Indian Removal, available at <http://www.britannica.com/presidents/article-9116896> (last visited Nov. 9, 2006).

<sup>67</sup> In Europe, the failure to comply with the decisions of the ECHR may lead to action by the Council of Europe, but the ECHR itself has no direct enforcement powers. Under Article 46 of the Convention, member states pledge to "abide by" the Court's judgments. European Convention, *supra* note 54. The Committee of Ministers, the central decision-making body in the Council of Europe, has the authority to "supervise" compliance. It serves this function in a systematic fashion by placing judgments on the public agenda of its regular meetings and inviting the member state to report on compliance. See Council of Europe's Web site Dedicated to the Execution of Judgments of the European Court of Human Rights, [http://www.coe.int/T/E/Human\\_Rights/execution](http://www.coe.int/T/E/Human_Rights/execution) (last visited Nov. 9, 2006); see also Council of Europe, Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, available at [http://www.coe.int/t/e/human\\_rights/execution/02\\_documents/CMrules2006.asp](http://www.coe.int/t/e/human_rights/execution/02_documents/CMrules2006.asp) (last visited Nov. 9, 2006). On a practical level, effective enforcement also depends upon each state's approach to incorporation of treaty obligations and the decisions of international bodies, with national courts playing a prominent role. See, e.g., John Cary Sims, *Compliance Without Remands: The Experience Under The European Convention on Human Rights*, 36 ARIZ. ST. L.J. 639, 643-44 (2004). There are many political, economic, and cultural incentives within the European system that promote what is essentially voluntary compliance. See, e.g., Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 605-11 (2004) (discussing how human rights norms in Europe are "embedded" within a network of mutually beneficial reciprocal state interests); see also Posner & Yoo, *supra* note 58, at 64-66. These circumstances clearly distinguish the European system from other international human rights institutions. See *infra* notes 143-45 and accompanying text.



on national enforcement and voluntary government compliance with the decisions of the ECHR. In this regard, the European system appears to thrive by virtue of a happy coincidence of mutually reinforcing incentives and the respect that the ECHR has earned over time. Similarly, a critical reason for the dearth of voluntary compliance outside Europe undoubtedly lies in the fundamental lack of respect that states exhibit toward the authority of most other existing human rights institutions and the paucity of incentives to induce such respect and compliance.

This apparent lack of respect for the authority of international human rights institutions is undoubtedly related to ambiguity regarding their legal mandate<sup>68</sup> and doubts over the legitimacy of "external" international decision-making regarding domestic practices.<sup>69</sup> The problem in this sense is two-fold. On the one hand, most international institutions have ambiguous or ill-defined legal authority that potentially could be interpreted as including authoritative jurisdiction over an extremely wide range of human rights issues, including those with highly debatable or controversial substantive content. At the same time, these institutions lack the attributes of institutional legitimacy that might engender widespread state trust and respect. Outside of Europe, virtually all of these international institutions suffer from politicized appointment processes, lack of financial resources, poorly defined legal authority, failure to utilize full-time professional judges, and flawed fact-finding processes.<sup>70</sup> These international decision-makers are generally unaccountable in the most literal sense, and render decisions that are, by definition, external to the body politic where the alleged violations occurred.

More significantly, these institutions have also failed to carefully and incrementally develop their own legitimacy and credibility over time in light of practical limitations on their powers and capacities.<sup>71</sup> They have, in

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<sup>68</sup> See *infra* notes 72–77 and accompanying text. Unresolved ambiguities over authority have plagued international institutions from their inception. In many ways, the lack of human rights enforcement has been defined by the persistent unresolved tension between international and domestic authority regarding the status of international institutions, human rights treaties, and international law itself. Most human rights treaties reflect this unresolved tension by leaving the respective roles of international and domestic institutions ill-defined and ambiguous.

<sup>69</sup> See Donoho, *supra* note 10, at 50–51.

<sup>70</sup> See *id.* at 36, 51–52; Donoho, *supra* note 26, at 854–68.

<sup>71</sup> One might, in this regard, contrast the historically incremental development of the ECHR's authority with the recent controversial assertions of authority (whether legally justified or not) by the HRC. Compare HOWARD CHARLES YUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF THE EUROPEAN COURT OF HUMAN RIGHTS JURISPRUDENCE* 196 (1996) (reviewing the incremental growth in the ECHR's legitimacy and authority), with Helfer,

essence, failed to evolve an appropriate and realistic relationship vis-à-vis domestic authority and democratic institutions. The circumstances of the Human Rights Committee (HRC), created by the International Covenant on Civil and Political Rights (ICCPR), are representative.

On the one hand, the substantive scope of human rights issues covered by the ICCPR is enormous, including both rights over which little legitimate dispute is possible (torture), as well as those raising morally charged issues that are highly contested in domestic societies (privacy, free speech, gay marriage). At the same time, the HRC's authority over this potentially wide range of issues is poorly defined. Article Two of the ICCPR endorses the primacy of national implementation and enforcement of rights, suggesting that domestic institutions have primary authority to implement and remedy rights recognized in the covenant.<sup>72</sup> Yet, the Committee is required in its consideration of state periodic reports and in "general comments" to monitor state compliance with the treaty and provide guidance to the parties. Similarly, under the individual petitioning process created by the ICCPR's Optional Protocol, the HRC is called upon to render its "views" and recommend appropriate remedies for violations.<sup>73</sup> Thus, while the HRC has no explicit authority to render binding interpretations of the covenant itself,<sup>74</sup> its functions obviously require some implicit authority to interpret the meaning of rights.

What role is the HRC to have? Here, reasonable differences of opinion are possible, although not encouraged by the treaty. The Committee itself has essentially taken the position that states are bound by their treaty obligations to implement the Committee's decisions.<sup>75</sup> However reasonable this position

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*Backlash*, *supra* note 46 (describing the controversy over decisions by the HRC regarding application of the death penalty among Caribbean states). *See also* Helfer & Slaughter, *supra* note 7, at 315–17, 355–56, 367 (also providing a general overview of similarities and differences between the characteristics and circumstances of the HRC and the ECHR); Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211, 214–37, 252–60 (1998).

<sup>72</sup> ICCPR, *supra* note 33, art. 2.

<sup>73</sup> *See* Optional Protocol, *supra* note 33, art. 5(4) (directing the committee to consider communications from individuals and "forward its views to the State Party concerned and to the individual").

<sup>74</sup> Neither of the two general powers given to the HRC, to review state periodic reports and issue general comments, include textual support for authoritative supervisory powers. ICCPR, *supra* note 33, art. 40 ("study" periodic reports of state parties and "transmit its reports, and such general comments as it may consider appropriate," to the parties). *See also* Mutua, *supra* note 71, at 235–39.

<sup>75</sup> In 1994, the HRC declared in General Comment 24(52) that it had the authority to determine the validity of state reservations. *See* Robert Rosenstock, *The Forty-ninth Session of*

may be, it has only minimal textual support, and there is no evidence that the Committee's decisions are treated as authoritative within the domestic systems of the various state parties.<sup>76</sup> Indeed, it seems probable that many state parties never intended to create such authority and some major governments, including the United States, have expressly disavowed its existence.<sup>77</sup>

Moreover, the HRC is sorely lacking in institutional attributes that might enhance its legitimacy and engender state respect for its authority. The eighteen part-time "experts" who serve on the committee come from diverse backgrounds and cultures.<sup>78</sup> The process for selecting such experts is largely political, with virtually no democratic domestic involvement.<sup>79</sup> The committee

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*the International Law Commission*, 92 AM. J. INT'L L. 107, 110 (1998); William A. Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & L. 79, 90-95, 109 (1997). More controversial, the HRC also announced that reservations found invalid, such as the U.S. reservations on the death penalty, were legally "severable" such that the reserving state was a full party to the treaty as if no reservation had been entered. Human Rights Comm., General Comment No. 24, ¶ 18, U.N. Doc. CCPR/C/21/Rev./Add.6 (Nov. 2, 1994). More recently, the HRC has declared that Canada violated the ICCPR by refusing, pursuant to an HRC interim measure, to stay the deportation of a man seeking review before the HRC. *Ahani v. Canada*, U.N. Human Rights Comm., Communication No. 1051/2002, ¶ 1.2, 5.3, U.N. Doc. CCPR/C/80/D/1051/2002 (2004), available at <http://www.worldlii.org/int/cases/UNHRC/2004/20.html>.

<sup>76</sup> The judgments of the HRC under the individual petitioning system, for example, are not generally thought to be enforceable in the domestic courts of state parties. See, e.g., *Ahani v. Canada* (Att'y Gen.), [2002] 58 O.R.3d 107, 108, 117-21 (Canada not bound to stay deportation proceedings based on the views of the HRC). Perhaps more significantly, states have tended to ignore the recommendations of treaty-based monitoring bodies. See *supra* notes 62-63 and accompanying text.

<sup>77</sup> See Government Responses, Observations on General Comment No. 24(52), on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, CCPR A/50/40/Vol.1, Annex VI (1996) (HRC has no power to issue binding interpretations); see also Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 469-70 n.253 (1999) (suggesting that Japanese courts have generally accepted government arguments that Japan is not bound by HRC interpretations of the ICCPR); Helfer, *supra* note 46, at 1870-82 (describing the refusal of some Caribbean states to comply with decisions of the HRC regarding capital punishment and eventual renunciations of the ICCPR itself).

<sup>78</sup> See Office of the United Nations High Commissioner for Human Rights, Human Rights Committee—Members, <http://www.ohchr.org/english/bodies/hrc/members.htm> (last visited Nov. 9, 2006). Geographic diversity is ensured by the requirement that experts are selected in accordance with the usual U.N. regional groupings. *Id.*

<sup>79</sup> See Donoho, *supra* note 10, at 17-18, 32-33, 32 n.101, 36-37, 36 n.110; see also Anne F. Bayefsky, *Direct Petition in the U.N. Human Rights Treaty System*, 95 ASIL PROC. 71, 74

has no real fact-finding processes, no appellate review process, and virtually no oversight.<sup>80</sup> Under these circumstances, it is simply not surprising that governments have been slow in legitimizing the HRC's work product and reluctant to concede its authority. The circumstances of the HRC are typical of international human rights institutions. Outside of the context of Europe, the status and legal authority of international decision-making in human rights are ambiguous at best, and international human rights forums typically lack important institutional attributes that might boost their legitimacy.

The ambiguous authority and weak institutional characteristics of international human rights institutions reflect the deeper underlying causes of their current ineffectiveness. Useful contrasts may be drawn between the European system and the other human rights institutions. The European Court of Human Rights has been successful not just because of its clear mandates and strong institutional attributes, or because of its intelligent decision-making. Rather, the Court also owes its success to the generally favorable political conditions within the member states, cultural and social affinities, rational jurisprudential limits on its authority, and the political and economic incentives that are associated with compliance and membership in the system.<sup>81</sup> None of these factors is present in the larger more diverse international community and are not likely to develop in the near future.

#### *D. Distinctions Among Rights, Institutional Legitimacy, and Practical Incentives*

There is, in a certain sense, a degree of incoherence built into the international system's general approach to enforcement. This incoherence implicates the very rationale for developing an international system of human rights in the first place. Lacking democratic safeguards, oppressive regimes

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(2001) (asserting that 50% of the 950 experts sitting on the four U.N. Treaty institutions with petitioning mechanisms over a twenty year period had jobs with their home government).

<sup>80</sup> Most cases before the HRC do not turn on factual disputes but rather involve legal disputes regarding the consistency of government action with the treaty. Nevertheless, individual petitions are considered based solely on documentation provided by the petitioner and responding state, leaving little room for accurate resolution of factual conflict. See STEINER & ALSTON, *supra* note 1, at 536.

<sup>81</sup> See Douglas Lee Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345, 363–65 (1991); cf. Posner & Yoo, *supra* note 58, at 61–62 (characterizing the “institutional setting” of the European Court of Justice as more like a “domestic court” because of the “bonds” created by the European Union). See STEINER & ALSTON, *supra* note 1, at 536.

face few domestic constraints on their treatment of people. The international human rights system seeks to create constraints in the form of international institutions and rules that might limit or temper government abuse of people. The internationalization of rights is, in essence, the search for higher authority to constrain the repressive power of abusive governments.<sup>82</sup>

Yet, no such higher authority currently exists.<sup>83</sup> The international legal system is generally still deeply committed to state sovereignty, and legal obligations depend almost exclusively upon state consent.<sup>84</sup> Nor is the development of such authority in human rights institutions likely in the foreseeable future. Outside of the relatively cohesive regional context of Europe, there are currently few incentives to create and adhere to broad grants of unambiguous international authority over human rights.<sup>85</sup>

Governments, whether progressive and enlightened, or oppressive and corrupt, naturally resist the idea of binding authoritative decision-making by "external" international institutions, particularly independent ones—at least with regard to their own actions. Within functioning constitutional democracies that generally respect basic rights, the incentives to create and comply with authoritative international human rights institutions are limited and the downside significant. Such states generally have their own extensive domestic safeguards to protect individual rights. However imperfect these domestic protections may sometimes be, delegation of authority over such

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<sup>82</sup> There are of course other important motivations for maintaining the international system of rights, such as the progressive improvement in social and economic conditions. Such goals, however, do not imply or require authoritative legal status for international institutions.

<sup>83</sup> One could certainly argue reasonably that the ECHR is an example of such higher authority and its potential for human rights enforcement. However reasonable this viewpoint, it is equally clear that Europe and the ECHR are, in many significant ways, *sui generis*. See *infra* notes 143–45 and accompanying text.

<sup>84</sup> It has become almost cliché to assert that traditional notions of sovereignty have changed significantly over the last fifty years. Extravagant claims about the demise of sovereignty, however, seem exaggerated when one considers actual state practice. International obligations still ultimately rest on state consent that can be withdrawn or altered within each state's discretion. And, even in the context of highly developed international legal regimes such as the WTO, states have surrendered sovereignty only cautiously and provisionally, retaining discretion whether to bear the economic consequences of non-compliance with international dispute settlement and decision-making processes. What can be said is that absolute state sovereignty, to the extent that it ever actually existed, has been eroded in the sense that there is increased international cooperation among states and expanded reliance on international norms and institutions to resolve some of their mutual concerns and problems.

<sup>85</sup> See *supra* notes 60–62, *infra* notes 86–88 and accompanying text.

issues to international institutions carries with it a potentially troubling loss of self-governance and accountability vital to democracy.<sup>86</sup>

Among repressive authoritarian governments, the reasons to resist the creation of effective international authority are more obvious. Authoritative international institutions would threaten not only the undemocratic government's prerogatives but also could challenge its legitimacy and hold on power. Indeed, all states have certain cynical incentives in maintaining a human rights system that lacks authoritative institutions capable of binding, enforceable decision-making. Such arrangements allow states to appear righteous, appease critics, and avoid undesirable international pressure while avoiding the real prospect of meaningful change.

Perhaps most importantly, the international community also currently lacks practical incentives to create an effective system of international enforcement of human rights. Any system that effectively enforces human rights against recalcitrant governments will involve sanctions that pose potentially significant costs to other competing interests such as trade, security, or foreign relations. History has shown that political and economic power is a better indicator of which governments may face international condemnation than actual human rights conditions. Undoubtedly most states generally place their own economic self-interest above principled responses to human rights conditions outside their own territory.<sup>87</sup>

Under these circumstances, governments of all stripes have strongly favored an emphasis on national enforcement and implementation of human rights via domestic institutions, conceding only limited and ambiguous authority for international bodies to supervise that process. They have

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<sup>86</sup> See Donoho, *supra* note 10, at 49–64. There are undoubtedly significant human benefits that derive from involvement in an international human rights system even in the context of well-functioning constitutional democracies. In many instances, the international community may provide incentives for improvement, and a prevailing international consensus might induce changes in social attitudes. The point here is simply that the case for providing international institutions with authoritative enforcement powers over contested moral issues is not compelling in the context of constitutional democracies in light of the accompanying losses of democratic accountability and self-governance. In contrast, when governments abuse fundamental rights relating to physical integrity or central political rights, the need for effective outside interference is obviously greater and the potential losses to local democratic choice and autonomy minimal. *See id.* at 61–64.

<sup>87</sup> See, e.g., Majorie Cohn, *Human Rights Hypocrisy*, TRUTHOUT, Feb. 27, 2006, [http://www.truthout.org/docs\\_2006/022706J.shtml](http://www.truthout.org/docs_2006/022706J.shtml); Joseph Loconte, *Reforming the Human Rights Agenda of the United Nations*, THE HERITAGE FOUNDATION, Sept. 13, 2005, <http://www.heritage.org/Research/InternationalOrganizations/bg1877.cfm>.

correspondingly limited international institutions to anemic enforcement capacities, leaving voluntary compliance the order of the day.

This reliance on national enforcement and volunteerism creates the unfortunate irony that the international human rights system is most needed where it is least effective, and most effective where it is least needed. In oppressive states, domestic institutions are incapable of enforcing human rights. Thus, where most needed—under oppressive regimes violating the most fundamental and universally accepted rights—the international system's traditional emphasis on voluntary domestic compliance with toothless international supervision is utterly inadequate and doomed to failure. Where potentially most effective—in those democratic states which respect the rule of law—an authoritative international system is least needed and poses significant costs to democracy.<sup>88</sup>

These competing forces have produced a complex and ill-defined balance between international and domestic authority that is still evolving but hardly satisfactory or even rational. The international system uneasily straddles the competing goals of preserving democratic sovereignty and autonomy, and effectively enforcing human rights against repressive regimes. Two of the most significant components in this dilemma are the legitimacy deficit of international human rights organizations described above and the broad scope of issues potentially under their jurisdiction. There is an important correlation here between these factors and the human rights system's historical refusal to distinguish among different categories of rights for enforcement purposes.

Human rights institutions (and many states) have historically resisted recognition of a hierarchy among rights even for enforcement purposes. This resistance has been based primarily on the ideological position that economic and social rights are of equal importance to civil and political rights.<sup>89</sup>

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<sup>88</sup> See *infra* notes 158–59 and accompanying text.

<sup>89</sup> Historically, many non-Western nations have taken the position that economic and social rights have priority over civil and political rights. See generally Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 469 (1983). See also Melanne Andromedea Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 BUFF. J. INT'L L. 285, 320–22 (1996) (describing China's continuing adherence to the argument that economic rights take priority over civil and political liberties). Western states have uniformly rejected that position while at the same time have cast doubt about the justiciability of economic and social rights. See generally Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 472–74 (2004). These divergent positions, largely political and

Whatever the relative merits of that debate, it fails to address the practical realities of enforcement. Indeed, distinctions among rights for purposes of enforcement are not hierarchies in the sense of importance at all. Rather, the point of such distinctions is that some rights enjoy a consensus over meaning that lends itself to successful international enforcement and the potential development of more meaningful international institutional arrangements and incentives for compliance.

In the context of our complex and diverse world community, the international enforceability of all rights is not the same. Certain violations, such as torture and most crimes against humanity, have a relatively non-controversial and universal meaning. They involve conduct that is readily identifiable, easily proved, and universally condemned by all. For these reasons, such violations are highly suitable for authoritative international enforcement mechanisms. Moreover, an enforcement focus on this limited range of universally accepted rights substantially enhances the potential for improving institutional legitimacy and alleviating fears about usurpation of democratic prerogatives.

The failure to distinguish among rights for enforcement purposes also relates directly to the more general problem of institutional legitimacy and credibility noted earlier. Existing human rights bodies lack institutional capacity and characteristics of legitimacy that can engender the trust and respect necessary to support either voluntary compliance or allocation of meaningful enforcement authority. A central aspect of this problem is a failure of human rights institutions to develop an appropriate role that accounts for differences among rights and respect for genuine democratic choice.

Both voluntary compliance and authoritative vertical enforcement by international institutions have important and mutually reinforcing functions in a world characterized by diversity and conflict. For some rights, an approach emphasizing promotion and voluntary compliance with international standards, rather than authoritative enforcement, makes sense. For genuinely contestable rights whose meaning or application is subject to public debate within functioning democratic societies, authoritative international enforcement is unnecessary, impractical, and counterproductive given its implications for

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retorical, initially resulted in the creation of separate international covenants for these two groups of rights. Later, the tension between these viewpoints led to numerous United Nations pronouncements about the "indivisibility" and "interdependence" of human rights and a clear aversion to any distinctions among rights, however rational. *See, e.g.,* Indivisibility and Interdependence of Economic, Social, Cultural, Civil, and Political Rights, G.A. Res. 44/130, U.N. Doc. A/Res/44/130 (Dec. 15, 1989).



democracy. Conversely, for universally accepted and uncontestable rights like torture, authoritative international enforcement is both necessary and achievable. A failure to recognize this practical reality has inhibited the development of meaningful international enforcement mechanisms.

The international system's traditional approach to enforcement has failed, at least in part, because of a failure to recognize such distinctions. Already saddled with weak institutional characteristics and ambiguous grants of authority, international human rights bodies are unlikely to engender sufficient state respect to create more authoritative enforcement mandates absent a more practical and nuanced approach regarding different categories of rights.

What can and should be done to address these weaknesses and create a meaningful system of human rights enforcement in the twenty-first century? There are, of course, no easy answers to this question. Reforms should, however, focus on the weaknesses and practical limitations described above. In this regard, important insights can be drawn from developing alternatives to the traditional enforcement model and from the success of the ECHR.

### III. CURRENT DEVELOPMENTS IN ENFORCEMENT: THE EVOLVING NEW PARADIGMS

The last decade has witnessed the continuing development of important alternatives to the traditional model of human rights enforcement.<sup>90</sup> These alternatives include the use of domestic criminal processes as reflected in the *Pinochet* litigation,<sup>91</sup> the use of domestic civil processes following the *Filartiga* line of cases,<sup>92</sup> and the development of international criminal law

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<sup>90</sup> There is a significant body of literature exploring each of these developments, some of which categorizes and evaluates them together as "transnational" law and process. See, e.g., William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129 (2000); William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002).

<sup>91</sup> The *Pinochet* case and its implications have produced divergent perspectives regarding the appropriate limits of human rights litigation and use of domestic criminal processes. See, e.g., Aceves, *supra* note 90; Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999); Jonathan I. Charney, Comment, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452 (1999).

<sup>92</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The Second Circuit's decision in *Filartiga*, upholding federal court jurisdiction over human rights violations committed against aliens overseas, has generated a tremendous outpouring of scholarly work. Among many helpful articles arguing for expansive use of the Alien Tort Statute see, for example, Beth Stephens,

processes such as the ad hoc tribunals for Rwanda and Bosnia, and the permanent International Criminal Court.<sup>93</sup> Each of these alternatives has its problems, and none is an enforcement panacea.<sup>94</sup> As detailed below, however, these alternative approaches do provide some direct advantages over existing approaches to human rights enforcement and, more significantly, offer

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*Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002); Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485 (2001); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 514 (1997); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); and Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141 (2001). Critics of the *Filartiga* paradigm include Bradley, *supra* note 18; and Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 356–68 (1997). The case has also spawned considerable litigation, including lawsuits against multinational corporations. See Stephens, *supra* note 18, at 437–38 (noting that there have been approximately 100 cases leading to published decisions under the Alien TOA Claims Act (ATCA)); Gregory G.A. Tzeuschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359 (1999) (describing and arguing in favor of litigation aimed at multinationals). The Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), placed significant, although yet to be fully elaborated, limitations on actions brought under the Alien Tort Claims Act (ATCA). See *infra* note 116 and accompanying text. See generally The Supreme Court, 2003 Term Leading Cases, *Federal Statutes and Regulations*, 118 HARV. L. REV. 446 (2004); Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004).

<sup>93</sup> Perhaps the best places to find factual and legal background information on the United Nations' ad hoc tribunals for the former Yugoslavia and Rwanda are their respective websites. See International Criminal Tribunal for the Former Yugoslavia (ICTY), <http://www.un.org/icty> (last visited Nov. 9, 2006); International Criminal Tribunal for Rwanda (ICTR), <http://www.icttr.org> (last visited Nov. 9, 2006). Much has been written, of course, about these tribunals and how they have functioned. For a thought provoking critique of these tribunals focused on Rwanda, see José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999). See also Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167 (1997). A third ad hoc tribunal with distinct characteristics was created in 2001 by agreement between the Security Council and Sierra Leone regarding human rights crimes committed during that country's recent civil conflict. S.C. Res. 1315, U.N. Doc. S/RES/1315 (2000). See generally Laura R. Hall & Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287 (2003). The "mixed" domestic and international process of this "Special Court for Sierra Leone" recently served as a model for similar institutions in East Timor and Cambodia. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 343 (2003).

<sup>94</sup> See *infra* notes 154–57 and accompanying text.

important insights regarding potential reform of the existing international system. These advantages and insights stem primarily from three characteristics shared by each alternative. The first is a common focus on a fairly narrow range of well-defined and universally agreed upon human rights norms. The second is general reliance on, or creation of, neutral judicial institutions with clearly defined and appropriately constrained legal authority over these universally understood and non-controversial rights. The third is recognition of individual accountability for the violation of such rights.

*A. National Criminalization of International Law Violations: The Pinochet Model*

In 1996, Spanish judicial authorities accepted jurisdiction to conduct a criminal investigation regarding alleged human rights violations committed by government authorities in Argentina and Chile during those countries' military dictatorships.<sup>95</sup> In October 1998, Judge Baltazar Garzon requested that the United Kingdom extradite former Chilean dictator Augusto Pinochet to Spain to face criminal charges resulting from this investigation. The relevant indictment charged Pinochet with conspiracy to commit torture, hostage taking, genocide, and summary execution of both Chilean and Spanish citizens during his seventeen year reign of terror that began with a September 11, 1973 coup.<sup>96</sup> This request for extradition asserted not only jurisdiction based on alleged crimes against Spanish citizens, often referred to as "passive jurisdiction,"<sup>97</sup> but also for crimes against Chilean citizens under a theory of universal jurisdiction.<sup>98</sup> The British courts denied extradition as to many of the

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<sup>95</sup> For a clear account of the factual background of the case, see Richard J. Wilson, *Prosecuting Pinochet in Spain*, 6(3) HUM. RTS. BRIEF 3 (1999). See also Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1070-86 (2004) (providing a detailed description of the Pinochet case from the factual background through the extradition process); Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 311-15 (2001).

<sup>96</sup> Orentlicher, *supra* note 95, at 1074; Roht-Arriaza, *supra* note 95, at 311-15.

<sup>97</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1987) (providing the commonly accepted definition of passive personality jurisdiction); Orentlicher, *supra* note 95, at 1074; Roht-Arriaza, *supra* note 95, at 314-15.

<sup>98</sup> See, e.g., Orentlicher, *supra* note 95, at 1073-74. See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (providing definition and description of universal jurisdiction); PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 23 (2001), available at [http://www.princeton.edu/~lapa/unive\\_jur.pdf](http://www.princeton.edu/~lapa/unive_jur.pdf) [hereinafter PRINCETON PROJECT]. Professor Orentlicher

alleged crimes on technical legal grounds relating to the requirement of dual criminality.<sup>99</sup> The British House of Lords, however, ultimately approved the extradition request as to a limited number of crimes alleged to have occurred after British accession to the Torture Convention.<sup>100</sup> U.K. foreign minister, Jack Straw, ultimately denied the extradition request on discretionary grounds related to Pinochet's allegedly failing mental health.<sup>101</sup>

The Court's decision, although more limited than many advocates hoped, directly supported the proposition that universal jurisdiction may justify

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points out that there are few clear prior examples of national courts relying on principles of universal jurisdiction to justify prosecution of criminal conduct that took place outside of their territorial jurisdiction. Orentlicher, *supra* note 95, at 1073–74. Israel's prosecution of Adolf Eichmann is a commonly cited example. Att'y Gen. of Israel v. Eichmann, 36 I.L.R. 18, 26 (Dist. Ct. Jer.) (1961), *aff'd*, 36 I.L.R. 277, 298 (S. Ct.) (1962). See also United States v. Yunis, 681 F. Supp. 896, 901 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991). Originally developed in response to piracy, see United States v. Smith, 18 U.S. (1 Wheat.) 153, 156 (1820) ("[P]irates being hostes humani generis, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all."), universal jurisdiction remains a critical concept in contemporary international criminal law. See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 102–34, 151–56 (2001); Mary Robinson, *Forward to PRINCETON PROJECT*, *supra*, at 14–18; see also Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004) (critiquing the analogy to piracy as a justification for modern applications of universal jurisdiction).

<sup>99</sup> Bow St. Metro. Stipendiary Magistrate, *Ex parte Pinochet Ugarte*, [2000] 1 A.C. 147 (H.L. 1999). See Frank Sullivan, Jr., *A Separation of Powers Perspective on Pinochet*, 14 IND. INT'L & COMP. L. REV. 409, 415–37 (2004) (providing a detailed description of the legal proceedings in the United Kingdom, including the legal analysis provided by the House of Lords).

<sup>100</sup> See *Ex parte Pinochet*, 1 A.C. at 198–201; see also Orentlicher, *supra* note 95, at 1079–80 nn.121–30 (providing a detailed description of the various opinions forming the basis for the House of Lords' judgment).

<sup>101</sup> See Sullivan, Jr., *supra* note 99, at 437–40. A commonly cited problem with utilizing universal jurisdiction to prosecute individuals having little or no connection to the forum involves resistance in the home nation to outside interference. See, e.g., Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFF., July/Aug. 2001 at 86; Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111, 140–43 (2003). The exercise of universal jurisdiction also raises legitimate fears of bias, violations of due process, politically motivated prosecutions, and increased international conflict. See, e.g., Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 340, 352–59 (2001); K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1, 1–2 (2004) (suggesting that traditional constraints on judicial action alleviate many concerns).

domestic criminal prosecution of certain violations of international human rights in states other than the one in which the offending acts were committed.<sup>102</sup> More controversially, the decision also recognized important limitations on public official immunities.<sup>103</sup> The British and Spanish courts, in essence, recognized that Pinochet, and others like him, could be prosecuted for certain universal crimes through the domestic criminal processes of any state that obtains personal jurisdiction over him. Citing criminal investigations or complaints brought in Belgium, Senegal, Austria, Canada, Denmark, France, Germany, the Netherlands, Spain, Switzerland, and the United Kingdom, Professor Diane Orentlicher reports that a "raft of countries have walked through the door the *Pinochet* case opened."<sup>104</sup> Enthusiasm for *Pinochet*-styled prosecutions has apparently waned, however, in light of controversial criminal complaints brought against prominent current or former public officials, such as Israeli Prime Minister Ariel Sharon, former President Bush, Colin Powell, General Tommy Franks, and Dick Cheney, among others.<sup>105</sup>

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<sup>102</sup> Aceves, *supra* note 90, at 169–71; Orentlicher, *supra* note 95, at 1074.

<sup>103</sup> See *Ex parte Pinochet*, 1 A.C. at 206–24; see also Orentlicher, *supra* note 95, at 1080–89. Spanish judicial authorities also separately ruled against Pinochet's claims of immunity. See Roht-Arriaza, *supra* note 95, at 312. Among the primary reasons that judicial refusal to recognize traditional immunities is controversial involves alleged interference with national reconciliation compromises and foreign affairs. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2543–46 (1991). The International Court of Justice, however, recently reaffirmed immunities in the case of *The Congo v. Belgium*, at least for incumbent public officials. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>. See Sarah C. Rispin, *Implications of Democratic Republic of The Congo v. Belgium on the Pinochet Precedent: A Setback for International Human Rights Litigation?*, 3 CHI. J. INT'L L. 527, 527–30, 535–36 (2002); see also Press Release, International Court of Justice, Certain Criminal Proceedings in France (Congo v. France), Press Release 2003/15 (Apr. 23, 2003), available at [http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-15\\_xx\\_20030422.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-15_xx_20030422.htm) (challenge to the legality of France's pursuit of criminal charges against the Congolese Interior Minister Pierre Oba).

<sup>104</sup> Orentlicher, *supra* note 95, at 1059–60.

<sup>105</sup> See Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 891–94 (2003); Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT'L CRIM. JUST. 400, 404–09; Glenn Frankel, *Belgian War Crimes Law Undone by its Global Reach: Cases Against Political Figures Sparked Crises*, WASH. POST, Sept. 30, 2003, at A1; see also David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 147–48 (2004). Spain's high court has also apparently retreated somewhat from the implications of Magistrate Garzon's pursuit of General Pinochet, imposing limitations on potential applications of universal criminal jurisdiction in Spanish courts. See Antonio Cassese, Comment, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589, 590 (2003) (noting that the Spanish high court suggests

### B. *The Filartiga Civil Litigation Paradigm*

In 1980, the Second Circuit upheld federal district jurisdiction over a civil claim brought by a Paraguayan citizen against a Paraguayan public official for torture that occurred in Paraguay.<sup>106</sup> Building slowly over subsequent years, the *Filartiga* model for civil liability against human rights violators has now generated a substantial number of cases,<sup>107</sup> recently including those directed at multinational corporations.<sup>108</sup> Much written about,<sup>109</sup> this enforcement

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that universal jurisdiction is “subsidiary” to prosecution in the home state and that additional links to Spain will normally be required).

<sup>106</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In 1976, local police officials kidnapped the Filartigas’ seventeen-year old son, Joelito, tortured him to death and presented his battered body to his sister. Shortly after fleeing Paraguay, the family was shocked to discover a key instigator of this horrific crime, Pena-Irala, had illegally taken up residence in the New York City area. Based on information provided by the Filartigas, Pena-Irala was eventually deported from the United States after being served with a federal court civil complaint seeking compensation for Joelito’s death. *Id.* at 876–79.

<sup>107</sup> Professor Stephens, an experienced human rights litigator who has written extensively on the ATCA, has reported that “approximately one hundred cases leading to decisions available online have alleged jurisdiction under the ATCA and related statutes . . .” Stephens, *supra* note 18, at 437–38. See also Boyd, *supra* note 101, at 2 n.6 & app. A (cataloguing ninety-two cases, nearly 80% of which resulted in summary judgment or dismissal); Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT’L L. REV. 169, 173 (2005) (citing “at least sixteen” successful suits). Two organizations, the Center for Justice and Accountability, <http://www.cja.org> (last visited Nov. 9, 2006), and the Center for Constitutional Rights, <http://www.ccr-ny.org> (last visited Nov. 9, 2006), have served prominent roles in bringing actions against human rights violators before U.S. courts. Although many cases have been brought, relatively few have resulted in judgments, and almost none have resulted in actual collection of damages. See *infra* note 155. But see Alfonso Chardy, *Torture Lawsuit Halts Lotto Winnings*, MIAMI HERALD, Mar. 31, 2006, at A1 (state court orders that annual lottery payments of former Haitian Army Colonel Carl Dorelien be placed in escrow pending resolution of Alien Torts Claims Act litigation in federal court).

<sup>108</sup> See, e.g., *Doe I v. Unocal Corp.*, 395 F.3d 932, 952–54 (9th Cir. 2002) (denying summary judgment on claims that Unocal was liable under the ATCA for aiding the Myanmar military in acts of murder, rape, and forced labor); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (later dismissed on forum non conveniens grounds in *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001)). See generally Recent Developments, *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025 (2001); Aaron Xavier Fellmeth, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?*, 5 YALE HUM. RTS. & DEV. L.J. 241 (2002). The Unocal case was recently settled. See Center for Constitutional Rights, Docket: *Doe v. Unocal*, [http://www.ccr-ny.org/v2/legal/corporate\\_accountability/corporateArticle.asp?ObjID=lrRSFKnmnm&Content=45](http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=lrRSFKnmnm&Content=45) (last visited Nov. 9,

alternative essentially envisions opening regular domestic civil courts to human rights victims seeking redress for violations occurring outside of the forum.

In the United States, where such remedies have been most prominently pursued, jurisdiction is conferred by statute and subject to significant limitations.<sup>110</sup> These limitations include tight restrictions on suing foreign government defendants,<sup>111</sup> due process requirements regarding personal jurisdiction that essentially require, as a practical matter, the physical presence of individual defendants in the United States,<sup>112</sup> and significant restrictions on available causes of action. Given the limited legal status of U.S. human rights treaty commitments,<sup>113</sup> customary international law has played a central role

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2006). The business community and the Bush administration have launched a frontal assault on such suits. See *Bush v. Alien Torts*, MOTHER JONES, Aug. 6, 2003, [http://www.motherjones.com/news/dailymojo/2003/08/we\\_522\\_03a.html](http://www.motherjones.com/news/dailymojo/2003/08/we_522_03a.html); Harold Hongju Koh, *Wrong on Rights*, YALE GLOBAL, July 18, 2003, <http://yaleglobal.yale.edu/display.article?id=2121> (criticizing the Bush administration's position).

<sup>109</sup> There is a mountain of excellent literature regarding the ATCA ranging from discourse over its history to the policy implications of utilizing customary international law to remedy human rights violations with no direct nexus to the United States. See *supra* authorities cited in note 92.

<sup>110</sup> Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2000). It is standard practice in U.S. human rights litigation to allege alternative bases for subject matter jurisdiction, including federal question jurisdiction under 28 U.S.C. § 1331 and universal jurisdiction as a matter of customary international law.

<sup>111</sup> The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1605 (2000), has made it nearly impossible to successfully sue foreign governments and their instrumentalities in U.S. courts for violations of human rights. See Coliver et al., *supra* note 107, at 187–88. The only potentially viable exception to immunity under the Act relates to violations against U.S. citizens by foreign governments designated as state sponsors of terrorism. See 28 U.S.C. § 1605(a)(7) (2000); *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997; see also *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (cases in which a foreign state committed a human rights violation on United States territory, thereby losing its immunity under § 1605(a)(5)).

<sup>112</sup> See Van Schaack, *supra* note 92, at 153–55, 176, 194–96 (describing the importance of “presence” as a basis for personal jurisdiction in ATCA litigation and its role during negotiations of the Hague Judgments Convention). Van Schaack describes significant opposition to so-called “tag” jurisdiction that has served as the basis for some ATCA lawsuits such as the *Kadic* case. *Id.*

<sup>113</sup> The United States has ratified several major international human rights treaties but, without exception, has declared each of these treaties to be “non-self-executing.” See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 416–23 (2000). The United States has also attached a series of “RUD’s” (reservations, understandings, or declarations) to each human rights treaty it has ratified. These provisions are designed to systematically eliminate potential conflicts with preexisting U.S. law

in the development of the *Filartiga* paradigm.<sup>114</sup> Since only a small number of human rights violations are considered part of customary international law,<sup>115</sup> lower federal courts have recognized a limited number of actionable violations. The Supreme Court has recently placed further, potentially significant, limits on the types of violations that may be actionable under the ATCA.<sup>116</sup> Although United States legislation specifically authorizes causes of action for certain foreign victims of torture and summary execution,<sup>117</sup> the Supreme Court's narrow interpretation of the ATCA essentially suggests that

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and practice. See, e.g., Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. U. J. INT'L HUM. RTS. 7 (2005); Louis Henkin, Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 345–48 (1995); see also Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727, 747–67 (1996). Such treaty obligations are, therefore, unenforceable under domestic law, and U.S. courts have refused to remedy their violation under the ATCA unless the alleged violation can be established as part of customary international law. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 880–85 (2d Cir. 1980); *Jama v. U.S. INS*, 343 F. Supp. 2d 338, 357–61 (D.N.J. 2004).

<sup>114</sup> *Filartiga* and the ATCA have, for example, figured prominently in the academic debate over the legitimacy of customary international law as a source of U.S. domestic law. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Goodman & Jinks, *supra* note 92; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739–52 (Scalia, J., concurring).

<sup>115</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1987) (listing these seven violations: genocide, torture, murder or causing disappearance, slavery, systematic racial discrimination, prolonged arbitrary detention, and a “consistent pattern of gross violations”).

<sup>116</sup> In *Sosa v. Alvarez-Machain*, the Supreme Court upheld use of the ATCA to litigate alleged human rights violations occurring overseas but placed significant limits on which violations could be actionable. 542 U.S. at 712–28. In many ways consistent with lower court rulings, the Court found that the ATCA is purely a jurisdictional statute under which only those violations that share certain characteristics with claims judicially cognizable when the statute was adopted in 1787, such as piracy, can be brought. *Id.* While the precise meaning of this standard is debatable, it is consistent with lower court decisions that have only recognized claims involving “specific, universal and obligatory” norms of international law. See *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); The Supreme Court, *supra* note 92; Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533 (2005) (reviewing the history of the ATCA and its future after the *Sosa* decision); see also Kontorovich, *supra* note 92.

<sup>117</sup> Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2000) (TVPA). The TVPA has been described as “codifying” the holding of *Filartiga*. See *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994). Its primary impetus, however, was to dispel any doubt about the existence of a cause of action under the ACTA for torture and summary execution. See Torture Victim Protection Act of 1991, S. REP. NO. 102-249, at 4 (1991); Goodman & Jinks, *supra* note 92, at 468.



recognition of remedies for other violations will be limited to those comparable to eighteenth century customary international law paradigms, such as piracy.<sup>118</sup>

### *C. The Developing Use of International Criminal Law Processes*

A third significant development in human rights enforcement involves the continuing evolution of international criminal law and its processes. Between Nuremberg and the dissolution of Yugoslavia in the early 1990s, international criminal law remained mired in world politics with little practical salience to human rights victims. The prospects for an effective international criminal law process for human rights violations were kept alive only in academic circles and on the backburners of a few obscure international institutions.

Atrocities in Rwanda and the former Yugoslavia, however, revived the prospects for creating an effective international criminal enforcement regime. Viewed as a threat to peace, these atrocities prompted the U.N. Security Council to establish two ad hoc tribunals with a mandate to deploy international humanitarian law in the defense of human rights.<sup>119</sup> Despite substantial obstacles,<sup>120</sup> the International Criminal Tribunal for Yugoslavia

<sup>118</sup> *Sosa*, 542 U.S. at 724. See *supra* note 116.

<sup>119</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *annexed to* Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/25704 (May 3, 1993); International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 59th Sess., 3453d mtg., U.N. Doc. S/Res/955 (Nov. 8, 1994). Each tribunal has the authority "to prosecute persons responsible for serious violations of international humanitarian law" committed in limited geographical areas and time frames. *Id.* art. 1. However, due to distinctions drawn by international humanitarian law between international and internal civil conflicts, there are differences in the subject matter jurisdiction of the two tribunals. See Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity,"* 22 BROOK. J. INT'L L. 111, 113-21 (1996). In particular, only the ICTY is technically empowered to enforce grave breaches of the 1949 Geneva Conventions, while both Tribunals may prosecute customary international law violations involving war crimes (Art. 3), genocide (Art. 4), and crimes against humanity (Art. 5). *Id.*

<sup>120</sup> See Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime & Punishment in the International Arena*, 25 NOVA L. REV. 463, 468-70 (2001) (former president of the tribunal describing the initial lack of support for its work); Mutua, *supra* note 93, at 180-85 (citing lack of resources and inadequate cooperation as serious impediments to the

(ICTY) has indicted 161 alleged perpetrators of serious violations of humanitarian law.<sup>121</sup> The Tribunal has found approximately fifty defendants guilty and approximately thirty are currently serving their sentence or awaiting transfer.<sup>122</sup> More than eighty other defendants are on trial, in detention, or under provisional release. Until his recent death, these defendants included the former leader of Serbia, Slobodan Milosevic.<sup>123</sup> The International Criminal Tribunal for Rwanda has completed twenty-eight prosecutions, primarily of public officials, for crimes relating to the 1994 genocide in Rwanda.<sup>124</sup> As of June 2006, twenty-seven additional defendants were on trial.<sup>125</sup> Although subject to legitimate criticisms,<sup>126</sup> these ad hoc tribunals have, without doubt, exceeded most expectations.<sup>127</sup>

The success of these ad hoc tribunals provided the needed political will to revitalize longstanding U.N. plans to establish a permanent international criminal court.<sup>128</sup> Since the ICC began operations in 2002,<sup>129</sup> it has received

tribunals' work).

<sup>121</sup> See International Criminal Tribunal for the Former Yugoslavia, ICTY at a Glance, <http://www.un.org/icty/glance/index.htm> (last visited Nov. 10, 2006).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See International Criminal Tribunal for Rwanda, Fact Sheets, Achievements of the ICTR, <http://69.94.11.53/ENGLISH/factsheets/achievements.htm> (last visited Nov. 10, 2006).

<sup>125</sup> *Id.*

<sup>126</sup> See generally Jose E. Alvarez, *supra* note 93 (providing an insightful critique of the premises which prompted the ad hoc tribunals and potential ill effects of primary international jurisdiction); Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 116–37 (2002) (critiquing deficiencies relating to presenting an effective defense); Todd Howland & William Calathes, *The U.N.'s International Criminal Tribunal, Is It Justice Or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT'L L. 135 (1998) (critiquing failures to develop a coherent vision of the tribunal in relation to human rights generally and to national processes).

<sup>127</sup> Perhaps in response to the perceived successes and failures of the first two ad hoc tribunals, the international community has participated in the creation of “hybrid” or “mixed” tribunals to address human rights violations in Sierra Leone, Kosovo, and East Timor. See generally CASSESE, *supra* note 93, at 343–46; Hall & Kazemi, *supra* note 93; Laura A. Dickinson, Note and Comment, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 296–300 (2003). Unlike the ICTY and ICTR, these new tribunals are designed as “mixed” tribunals in the sense that they incorporate and rely on both domestic and international law and are staffed by both domestic and international decision-makers. See Dickinson, *supra*, at 296–300.

<sup>128</sup> CASSESE, *supra* note 93, at 341. The initial impetus for a permanent international criminal court came from the U.N. General Assembly after World War II. See G.A. Res. 260B (II), at 177, U.N. Doc. A/810 (Dec. 9, 1948). For an account of these earlier efforts to establish the Court and a brief history of modern international criminal law leading to the U.N. ad hoc tribunals, see M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need*

four requests to investigate situations alleged to involve crimes under the treaty.<sup>130</sup> Although important aspects of the Court's jurisdiction are distinct from its predecessors,<sup>131</sup> the Court was clearly modeled after currently existing ad hoc tribunals. Like the ad hoc tribunals, the Court is essentially designed to address "serious crimes of concern to the international community" in the general categories of genocide, war crimes, and crimes against humanity.<sup>132</sup> Each category of crime is further defined in the Treaty to include a variety of egregious violations of human rights committed in the context of armed conflict, such as murder, ethnic cleansing, rape, and torture.<sup>133</sup> The Treaty also creates a process for defining the required elements to the crimes.<sup>134</sup> While some important and difficult disputes over the definition of such crimes have and will arise,<sup>135</sup> the Court's substantive focus is limited to the most egregious

*to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997). See also CASESSE, *supra* note 93, at 327–46.

<sup>129</sup> The treaty establishing the Court came into force after receiving its sixtieth ratification in 2002. See ICC Treaty, *supra* note 43, art. 126; see Official Website of the ICC, About the ICC, <http://www.icc-cpi.int/about.html> (last visited Nov. 10, 2006).

<sup>130</sup> The Congo, Uganda, and the Central African Republic have each referred situations occurring within their territories to the ICC Prosecutor for investigation and possible prosecution. The Prosecutor is also now investigating the situation in Darfur, Sudan pursuant to U.N. Security Council Resolution 1593 (2005). See Official Website of the ICC, Situations and Cases, <http://www.icc-cpi.int/cases.html> (last visited Nov. 10, 2006).

<sup>131</sup> See *supra* note 119 and accompanying text.

<sup>132</sup> See ICC Treaty, *supra* note 43, art. 5(1). The Court will eventually also exercise jurisdiction over the "crime of aggression," once the state parties reach agreement over the definition of that controversial concept. *Id.* art. 5(2).

<sup>133</sup> *Id.* arts. 6–8.

<sup>134</sup> *Id.* art. 9.

<sup>135</sup> Opponents of the ICC have cited, in addition to potential third-country jurisdiction over U.S. military personnel, definitional ambiguity over critical concepts such as military necessity, proportionality, military targets, and the crime of aggression. See Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 95–96 (2003); Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 209–13 (2001) (discussing the crime of aggression among other definitional issues); see also Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005); Symposium, *The International Response to the Environmental Impacts of War*, 17 GEO. INT'L ENVTL. L. REV. 565, 625–26 (2005) (comments of Mark Drumbl); Valerie Oosterveld, *The Definition Of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55 (2005). But see David Hunt, *The International Criminal Court: High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges*, 2 J. INT'L CRIM. JUST. 56 (2004) (criticizing an overly restrictive use of detailed definitions that undermine flexibility).

forms of human rights violations over which an international consensus generally exists.

Unlike the ad hoc tribunals, however, the ICC has broad geographic jurisdiction but only complementary or subsidiary jurisdiction over the prosecution of accused war criminals.<sup>136</sup> In effect, the ICC is designed to prosecute violations of a clearly defined set of international crimes only when the state of origin is unable or unwilling to do so in good faith.<sup>137</sup> The Rome Treaty also allows for the ICC to exercise jurisdiction over a non-party national when that defendant commits prosecutable offenses in the territory of a state party.<sup>138</sup> The Court may also exercise jurisdiction over a non-party national who commits prosecutable crimes in a non-party state if that state specially agrees to such jurisdiction.<sup>139</sup> This provision, and allegedly insufficient Security Council oversight power, has caused considerable controversy and figures prominently in the Bush administration's active campaign to undermine the ICC and its potential jurisdiction over Americans.<sup>140</sup>

#### *D. Lessons from the ECHR: Institutional Legitimacy and Practical Incentives*

The ECHR is neither new, nor in the strict sense of the word, a developing alternative to the traditional model of human rights enforcement. Originally created just after World War II,<sup>141</sup> the ECHR has had a longer history than most international human rights bodies and considerably more success. In many ways, the ECHR represents the only example of a traditional

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<sup>136</sup> ICC Treaty, *supra* note 43, art. 17.

<sup>137</sup> *Id.* arts. 17–19.

<sup>138</sup> *Id.* art. 12(2).

<sup>139</sup> *Id.* art. 12(3).

<sup>140</sup> See Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63, 63–64 (2003); Goldsmith, *supra* note 135, at 90–98; William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 714–19 (2004) (like Goldsmith, also attributing independence from the U.N. Security Council as part of U.S. opposition to the ICC).

<sup>141</sup> Created under the Council of Europe, the Court was formed through the adoption of the European Convention on Human Rights by Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. European Convention, *supra* note 54. The Convention preamble emphasizes the parties' commonalities, describing members as "like-minded and hav[ing] a common heritage of political traditions, ideals, freedom and the rule of law . . ." *Id.* pmbl.

international enforcement paradigm that functions effectively, albeit only on a regional level.<sup>142</sup>

There are, of course, many reasons to doubt whether the *sui generis* circumstances of the ECHR qualify it to serve as a realistic model for other more global institutions.<sup>143</sup> The community of nations that the ECHR serves has been, at least until recently, significantly homogeneous with shared cultural, social, and political affinities.<sup>144</sup> More importantly, the region has a shared history and future, not the least of which involves the extraordinary economic, social, and political entanglements of the European Union. Although technically and legally distinct from the European Human Rights system and the ECHR, the institutions of the EU have adopted significant commitments to human rights, following the direction and guidance of the ECHR.<sup>145</sup> These linkages create vitally important incentives for compliance

<sup>142</sup> See generally Helfer & Slaughter, *supra* note 7 (promoting the European system as a model of effective international adjudication of human rights).

<sup>143</sup> Donoho, *supra* note 81, at 363–66.

<sup>144</sup> Membership in the Council of Europe has increased dramatically in recent years, especially due to the addition of former socialist states from Central and Eastern Europe. Since 1990, membership in the Council has increased to forty-six states, with twenty-six new members from Central and Eastern Europe. Council of Europe, the Council of Europe's Member States, [http://www.coe.int/T/E/Com/about\\_Coe/Member\\_States/default.asp](http://www.coe.int/T/E/Com/about_Coe/Member_States/default.asp) (last visited Nov. 10, 2006). All of these states have also ratified the European Convention on Human Rights as an unwritten precondition for membership in the Council. Rudolf Bernhardt, Current Development, *Reform of the Control Machinery Under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT'L L. 145 n.10 (1995). The addition of states such as Bulgaria, Russia, Albania, Romania, and Slovenia has added significant new diversity to the European human rights system.

<sup>145</sup> Over the course of many years, the European Court of Justice (ECJ) has slowly incorporated human rights law, as developed and interpreted by the ECHR, into EU jurisprudence. See generally Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT'L L. 95, 111–18 (2003). The ECJ has, however, declared that the EU may not become a member of the European Convention:

As Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms because no provision of the Treaty confers on the Community institutions in a general way the power to enact rules concerning human rights or to conclude international agreements in this field . . .

Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759. Recent revisions to the EU treaty regime directly reference protection of human rights. See Shelton, *supra*, at 113–14. In 2000, the EU proclaimed a new Charter of Fundamental Rights and Freedoms. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1. The proposed European Constitution would directly incorporate the Charter and human rights into the EU legal structure. See Stephen C. Sieberson, *How the New European Union Constitution Will Allocate Power*

that are currently absent outside of Europe. Despite these important differences in circumstances, the ECHR's successes provide important insights regarding reform of international enforcement generally.

First, the ECHR serves as proof positive that there are many advantages to regional rather than global approaches to human rights enforcement. Regionalism may not only take advantage of cultural and social affinities (in developing culturally sensitive interpretations of rights), but also profit from critical economic and political linkages that create practical incentives for state compliance. A regional focus also has advantages for institutional legitimacy by increasing connections between decision-makers and local populations.

Second, although the ECHR currently renders judgments over a wide range of human rights issues including controversial topics,<sup>146</sup> it has arrived at this point incrementally over time as its prestige and credibility warranted. More importantly, it has imposed on itself important jurisprudential limits that avoid overreaching and undesirable interference with legitimate cultural and policy preferences of its constituent national democracies. Primary among these are the principles of subsidiary, European supervision, and the "margin of appreciation" doctrine that utilizes European consensus to limit the court's interpretive alternatives.<sup>147</sup> This reliance on consensus over the meaning of rights has been a crucial component in the evolution of the Court's legitimacy and, correspondingly, its ultimate success in enforcement.

Third, the Court's institutional practices, ranging from selection of judges to litigation procedures, are far more professional and credible than those of most other international human rights enforcement institutions. The full-time employment of highly trained professional judges and staff, vetted by the domestic political processes of the state parties and provided with adequate financial resources, is fundamental to the ECHR's success. Finally, as previously noted, the ECHR benefits enormously from social, political, and economic linkages, which provide substantial incentives for compliance with the court's decisions. The development of such incentives, tied to the

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*Between the EU and Its Member States—A Textual Analysis*, 37 VAND. J. TRANSNAT'L L. 993 (2004).

<sup>146</sup> See, e.g., *Cossey v. United Kingdom*, 13 Eur. H.R. Rep. 622 (1991) (transsexualism); *B. v. France*, 16 Eur. H.R. Rep. 1 (1993) (transsexualism); *X v. United Kingdom*, 24 Eur. H.R. Rep. 143, 169 (1997) (state refusal to register transsexual as father of child conceived through artificial insemination); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) (homosexual sodomy); *Wingrove v. United Kingdom*, 24 Eur. H.R. Rep. 1, 6–17, 19–21 (1997) (upholding government refusal to license video based on blasphemous content).

<sup>147</sup> See generally Donoho, *supra* note 22, at 450–66.

decisions of reformed international institutions focused on universally understood rights, may prove crucial to the eventual enforceability of international rights generally.

#### IV. THE FUTURE OF HUMAN RIGHTS ENFORCEMENT

Both the success of the ECHR and developing enforcement alternatives described above potentially have two significant implications for the future of human rights enforcement. First, these developments have some potential for creating effective alternatives to more traditional approaches to enforcement. As noted below, however, there are certain problematic aspects to these alternatives that may limit their potential usefulness in this regard. Second, and perhaps more importantly, these developing alternatives may provide critical insights regarding how to remedy critical weaknesses in existing approaches and institutions.

##### *A. Providing Effective Enforcement Alternatives*

How might the enforcement alternatives described above directly advance the effectiveness of human rights? In the first instance, all three alternatives have some potential for enhancing deterrence against violations of international standards. Traditional enforcement techniques, aimed almost exclusively at governments, currently provide limited deterrence against human rights violations. It is true, of course, that the dearth of realistic practical incentives and consequences for governments is central to this lack of effective deterrence and must ultimately be addressed.<sup>148</sup> However, it seems equally rational to believe that an increased focus on individual accountability should improve deterrence by creating significant personal disincentives for individual perpetrators of abuse. Although currently only a potential, an optimist could easily envision a network of states utilizing universal jurisdiction to provide criminal and civil remedies in a fashion that denies "safe haven" to individual human rights violators.<sup>149</sup> An important first step

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<sup>148</sup> See *supra* notes 81, 85–88, 145–47 and accompanying text.

<sup>149</sup> This is a common theme of those who advocate use of transnational litigation. See, e.g., Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complimentary Strategies*, 19 EMORY INT'L L. REV. 169, 177–79 (2005).

in preventing violations is eliminating the perception of individual impunity generated by current conditions.

This focus on individual accountability also tends to circumvent the paucity of government incentives to effectively enforce international standards against other governments. Both the *Filartiga*- and *Pinochet*-style remedies are dependent to some degree on the political will of the host forum, which must, in the first instance, generally authorize such remedies.<sup>150</sup> However, if appropriately limited to avoid overt political abuse and conflicts with national foreign policy, neither remedy should depend directly on case-by-case government-bound motivations, which are inevitably linked to competing policy and political interests. Once such actions are authorized by domestic law, particular cases are at least partly isolated from competing national interests. This, and increased victim access and control over remedies, should lessen the potential for political manipulations—a problem that has often plagued the work of international human rights bodies.<sup>151</sup>

Finally, although in distinct ways, each of these developing enforcement alternatives avoids some of the institutional weaknesses reflected in the traditional mechanisms for enforcement.<sup>152</sup> Domestic institutions utilized under the *Filartiga* and *Pinochet* paradigms will usually enjoy well-established authority and effective means for effectuating their decisions. Domestic courts, for example, are more likely to be staffed by independent, professional judges and their jurisdiction defined and controlled by legislation. Also subject to a degree of public accountability, such institutions enjoy the attributes of legitimacy and credibility currently lacking in most existing international forums.<sup>153</sup>

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<sup>150</sup> The host forum legal system must authorize or approve such remedies, typically through legislative or judicial action. Similarly, criminal prosecutions such as those in *Pinochet* will typically depend on discretionary judgments made by government prosecutors or judges. See, e.g., *supra* notes 95–101, 104 and accompanying text.

<sup>151</sup> See *supra* note 47.

<sup>152</sup> International institutions currently have many built-in limitations on their enforcement capacity, some of which are inherent. See *supra* notes 43–55, 61–64, 75–78 and accompanying text. Reliance on well-established and respected domestic institutions with regularized enforcement capacity helps avoid some of these limitations.

<sup>153</sup> There is, however, at least one sense in which foreign domestic institutions will lack an important component of legitimacy. Decisions rendered by foreign domestic processes regarding extraterritorial events possess neither intrinsic connections nor elements of local accountability to the people and culture of the place where the relevant violations occurred. See *supra* notes 101, 103 and accompanying text. This lack of “connectivity” makes it critical that such foreign or extrinsic remedies focus on the narrow range of rights that enjoy universal acceptance and



It is easy, however, to overstate the potential enforcement value of these alternatives. The options described above are, at least for now, not sufficiently widespread or accepted to make significant advances towards alleviating human rights abuses.<sup>154</sup> Put into perspective, it is difficult to view the limited number of civil judgments against foreign defendants brought before U.S. courts as anything other than symbolic.<sup>155</sup> Similarly, the reality is that there have been no successful domestic criminal prosecutions following the *Pinochet* model, and Belgium's recent experiment with full-scale adoption of universal jurisdiction has revealed problematic implications and distinct practical limitations on its use.<sup>156</sup>

There also appears to be significant limits on the potential effectiveness of international criminal processes. The number of actual defendants that will appear before such tribunals, if the ICTY's experiences hold true, will be quite limited. Like the ad hoc tribunals before it, the ICC will undoubtedly have difficulty apprehending future defendants, and the subsidiary role of the ICC

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clear definitions susceptible to culturally neutral applications. *See also* Donoho, *supra* note 22, at 450–66.

<sup>154</sup> Evidence about the potential spread of *Filartiga*-style civil remedies to countries outside of the United States is somewhat murky. There is at least some evidence that similar remedies are increasingly available in Europe in the form of reparations relating to criminal charges for extraterritorial human rights violations. *See* Van Schaack, *supra* note 92, at 144–47.

<sup>155</sup> While many claims have been brought under the ATCA and TVPA, *see* Stephens, *supra* note 18, only a modest number have resulted in judgments, mostly through default. *See* Coliver et al., *supra* note 149, at 176 (citing sixteen cases resulting in judgments); Stephens, *supra* note 116, at 533, 534 (noting that “interest [in ATCA] far outstrips the actual results of the litigation: most ATS cases have been dismissed, only about two dozen cases have produced final judgments under the statute, and only one judgment has led to the collection of significant damages”); *see also* Van Schaack, *supra* note 92, at 170. The requirements of jurisdiction essentially ensure that only a limited number of defendants—those who travel to the United States—will ever be brought to justice before U.S. courts. *But see* Coliver et al., *supra* note 149, at 175 (reporting that the Center for Justice and Accountability estimates that “several hundred” potential defendants currently reside in the United States). Similarly, the potential for victims to ever in fact receive compensation is probably limited in that most defendants do not have significant assets or are able to hide their assets. *See, e.g.*, George Norris Stavits, Note, *Collecting Judgments in Human Rights Torts Cases—Flexibility for Non-Profit Litigators?*, 31 COLUM. HUM. RTS L. REV. 209, 214–16 (1999); Coliver et al., *supra* note 149, at 179 (addressing the difficulty of reaching defendants’ assets). Whether such suits provide any realistic deterrence against human rights violations remains correspondingly uncertain. However, as many have pointed out, symbolism and intangible benefits to those limited number of victims who find their way to U.S. courts have real value if for no other reason than preventing the United States from becoming a safe haven for human rights abusers. *Id.* at 175–86.

<sup>156</sup> *See* Steven R. Ratner, Comment, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 891–94 (2003); Vandermeersch, *supra* note 105, at 404–09.

will limit its prosecutions to those where political conditions become favorable and domestic alternatives are impossible.<sup>157</sup>

Yet, despite these limits and other potential downsides, these developing alternatives should be lauded as potentially useful tools for enforcing human rights. Each has, in essence, opened new frontiers in the quest for accountability. Their importance does not lie in their current effectiveness, but rather in their potential. The *Filartiga* and *Pinochet* approaches create potentially vibrant enforcement precedents by opening neutral domestic courts to victims of human rights violations occurring in places where local domestic redress is implausible or ineffective. Widespread adoption of such remedies grounded in appropriately limited universal jurisdiction, especially among Western industrialized democracies where former human rights abusers are most likely to hide, would undoubtedly increase the potential that human rights victims will have access to neutral and effective judicial redress.

#### *B. Insights for Reform: Defining Appropriate Roles for International Institutions*

What lessons for improving existing institutional frameworks may be drawn from the enforcement alternatives and the successes of the ECHR described above? Initially, it should be recognized that effective international human rights institutions are critical to world-wide realization of human rights. Enforcement of human rights is ideally the job of domestic institutions where alleged violations occur. We live, however, in a less than ideal world, where effective domestic protection of individual rights will continue to be often impossible. In our imperfect world, international human rights bodies must and should play a vital role in enforcing rights and providing redress.<sup>158</sup>

The central characteristics of the enforcement alternatives described above provide insights into how a remodeled international system might more effectively fulfill these functions. First and most importantly, the international community should make critical distinctions among rights with regard to enforceability. Enforcement mechanisms regarding well-defined, universally accepted rights for which international consensus over meaning exists will be more palatable and more readily accepted by governments. This is true not

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<sup>157</sup> See generally Goldsmith, *supra* note 135.

<sup>158</sup> These international institutions also serve many valuable roles apart from enforcement. The work of promoting rights awareness, exposing violations, and responding to human rights crises is vital, and in critical ways, distinct from the work of authoritative enforcement.

only for accused governments, but also for the international community generally, whose cooperation in creating meaningful incentives for compliance is vital. Mandatory sanctions through recourse to the U.N. Security Council, or economic incentives linked to the WTO or IMF are, for example, far more likely to be accepted if limited to violations of universally understood and accepted rights.

Similarly, this more nuanced approach to the enforceability of different categories of rights, if coupled with other institutional reforms, would significantly enhance the perceived legitimacy of international human rights institutions. Attempts to authoritatively interpret and enforce specific applications of human rights that are subject to genuine cultural and political dispute inevitably raise concerns about overreaching, lack of accountability, and usurpation of local choice. By focusing enforcement efforts (as opposed to non-binding promotional activity) on universally understood and relatively uncontroversial rights, concerns over institutional legitimacy are greatly ameliorated.

Such distinctions among rights also lend themselves to important institutional reforms that could prompt governments to accept more authoritative enforcement mandates. For example, the newly created ICC has enormous potential for engendering state respect for its authority that is typically missing from existing international human rights institutions. Unlike most existing institutions, the ICC has been created with a clearly defined and circumscribed mandate and relatively narrow subject matter focus. Fears of overreaching or politicized decision-making should be generally alleviated by the subsidiary nature of the court's jurisdiction. While the ICC's ultimate legitimacy and credibility will depend in part on whether it earns the respect of states incrementally over time, it is legally well situated to accomplish that goal. The jurisdiction and mandate of existing institutions should be amended and clarified, or new institutions created, to reflect such distinctions.

Such distinctions and limits on jurisdictional mandate will not only greatly improve the perceived legitimacy of human rights institutions, they may help mediate the inherent tension between authoritative international enforcement and domestic democratic prerogatives. I have argued elsewhere that the preservation of democratic values and our concerns over the democratic legitimacy of human rights decision-making should shape how the international community approaches enforcement, particularly regarding the authority of international institutions.<sup>159</sup> Indeed, in a perfect world populated

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<sup>159</sup> Donoho, *supra* note 10.

by functioning democratic states with reasonable domestic institutional safeguards, authoritative international remedies might reasonably be seen as inappropriate or counterproductive to democratic ideals.<sup>160</sup>

A key consideration in this regard once again involves jurisdictional constraint and distinctions among rights. Enforcement focused on international consensus, universal jurisdiction, and *jus cogens*, for example, sharply reduces concerns over the democratic authenticity and accountability of international decision-making. Violations subject to universal jurisdiction, like those that justify the prosecution of war crimes by the ICC, are not “foreign” or “external” to the world’s domestic legal systems and societies. Rather, parallel legal norms exist within virtually all domestic legal systems and are deeply interwoven into the cultural and social fabric of every society. A new name for an old wrong like “ethnic cleansing” does not imply that the Bosnian Serbs had a different moral or legal code on that subject before international standards were developed by the ICTY. The traditional norms and morals of virtually all societies, including Serbia, were violated by the atrocities committed in Bosnia.

The creation of new or revised enforcement mandates, limited to rights over which true international consensus exists, should be coupled with other institutional reforms designed to promote credibility and respect. Models for such institutional reforms should include the ECHR and ICC. Although imperfect, both institutions possess generally credible and neutral procedures for selecting judges or “experts,” professional and regularized rules of evidence and procedures, and plausibly sufficient staffs and budgets.

Finally, the reforms described above must be accompanied by efforts to link resulting international decisions to practical economic and political consequences that create practical incentives for voluntary compliance. Such incentives, crucial to the success of the ECHR, are only likely to develop,

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<sup>160</sup> *Id.* at 56–64. It must be acknowledged that the developing enforcement alternatives described above, if used without constraint, are not entirely consistent with this outlook. For example, the most troubling objections to the *Pinochet* case have centered on the policy implications that arise when foreign courts indict former heads of states or other public officials, particularly when the originating jurisdiction has granted amnesties or is attempting other forms of national reconciliation. Foreign litigation and prosecutions under these circumstances have the potential to usurp the originating state’s domestic processes and prerogatives. This potential for external interference with domestic democratic choice is similar to that created by authoritative international decision-making. In this sense, the *Pinochet* and *Filartiga* paradigms create variants on the inherent tension between international and domestic authority. Thus, these enforcement paradigms create new and distinct accountability issues since each involves decision-makers external to the people, culture, and context in which the violations took place.

however, with regard to decisions limited to enforcement of a fairly narrow range of universal rights over which true concerns exists.

## V. CONCLUSION

Enforcement remains the weakest component of the international human rights system. Designed around the implausible premise of voluntary state compliance, existing international institutions outside of Europe currently lack the capacity to meaningfully enforce human rights in a world characterized by conflict and diversity. Already hobbled by institutional weaknesses, existing human rights bodies have failed to develop incrementally their legitimacy and earn the respect of governments by developing a nuanced approach to enforcement that recognizes distinctions among rights regarding enforceability. Lessons for reform should be drawn in this regard from the ECHR and developing enforcement alternatives that focus on individual accountability for a fairly narrow range of rights over which international consensus exists.